IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-492

~~UNITED STATES OF AMERICA,~~

~~*Petitioner,*~~

by DOROTHY S. GREENBERG,
for herself as well as for the United States of America,
*Relator-Petitioner*

— against —

THE BURMAH OIL COMPANY LIMITED, BURMAH OIL INCORPORATED, BURMAH OIL TANKERS LIMITED, BETHEL MARINE, INC., SOUTHHOLD MARINE, INC., VERMONT MARINE, INC., BURMAST EAST SHIPPING CORP., BURMAH GAS TRANSPORTATION LIMITED, ELIAS J. KULUKUNDIS, SUMMIT MARINE OPERATIONS, INC., SUMMITT I, INC., SUMMITT II, INC., SUMMITT III, INC., CHEROKEE I SHIPPING CORPORATION, CHEROKEE II SHIPPING CORPORATION, CHEROKEE III SHIPPING CORPORATION, CHEROKEE IV SHIPPING CORPORATION, CHEROKEE V SHIPPING CORPORATION, ENERGY TRANSPORTATION CORPORATION, C.Y. CHEN, JOSEPH J. CUNEO, JEROME SHELBY, CRYOGENIC ENERGY TRANSPORT, INC., LNG TRANSPORT INC., LIQUEGAS TRANSPORT INC., JAMES DURBIN, JOHN C. BULLITT, FIRST NATIONAL CITY BANK, CITICORP LEASING, INC., GENERAL AMERICAN TRANPORTATION CORP., GENERAL DYNAMICS CORPORATION, CITIMARLEASE (BURMAH I), INC., CITIMARLEASE (BURMAH LNG CARRIER) INC., CITIMARLEASE (BURMAH LIQUEGAS), INC., and CITICORP,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner Dorothy S. Greenberg, individually as well as for the United States of America respectfully prays that a Writ of Certiorari issue to review the affirmation by the United States Court of Appeals for the Second Circuit of the judgment of the federal district court below dismissing the Petitioner's *qui tam* action for lack of jurisdiction. This case involves novel questions of federal law pertaining to the proper statutory constructions of federal law pertaining to the proper interpretation of the jurisdictional provisions of the False Claims Act (31 U.S.C. §231 *et. seq.*) and the propriety of the application of those provisions so as to bar the Petitioner's *qui tam* action based upon documents which were admittedly not in the United States' Government's possession at the time she filed suit. The Petitioner's action brought to light an alleged fraud being perpetrated upon the United States Government by a foreign corporation which availed itself of U.S. financing for ship construction purposes, contrary to the statutory prohibitions of the Merchant Marine Act of 1936, by organizing dummy corporations in the United States.

## OPINIONS

The Opinion of the Court of Appeals for the Second Circuit is reported at 558 F.2d 43 (1977), and appears in the Appendix at page A.2. The Court of Appeals' Order denying the Petition for Rehearing and Rehearing En Banc on July 1, 1977 appears at page A.2. The Court of Appeals' Order denying the Petition in the Appendix at page A.9. The unreported Memorandum Opinion of the federal district court below appears in the Appendix at page A.10.



## JURISDICTION

The Court of Appeals for the Second Circuit affirmed the judgment of the federal district court on May 11, 1977. A timely Petition for Rehearing and Rehearing on En Banc was denied on July 1, 1977. This Petition for Certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254 (1) (1970).

## QUESTIONS PRESENTED

### I.

Whether an erroneous application of the jurisdictional provisions of the False Claims Act should be allowed to prevent a thorough judicial examination of a major fraud being perpetrated upon the United States Government by a foreign corporation which has availed itself of U. S. financing for ship construction purposes, contrary to the Merchant Marine Act of 1936, by organizing dummy corporations in the United States which have applied for and secured construction differential subsidies and federal guarantees of debt obligations that are only available to U.S. citizens.

### II.

Whether the jurisdictional provisions of the False Claims Act should be interpreted and applied in a manner which bars access to the federal courts by a private citizen having possession of material documents and information evidencing the perpetration of a major fraud against the United States Government.

## STATUTORY PROVISIONS INVOLVED

*The False Claims Act.*

31 U.S.C. Sections 231, 232 (A)(B)(C) (E), 233, 234 and 235.

*The United States Shipping Act of 1916.*

46 U.S.C. Section 802.

The foregoing statutory sections are set forth in the Appendix at A.16.

## STATEMENT OF THE CASE

Petitioner — Relator Dorothy S. Greenberg ("Relator") filed this action in the federal district court for the Southern District of New York pursuant to the False Claims Act [31 U.S.C. §232 (A), (C)] on September 30, 1976, on behalf of and in the name of the United States of America (the "Government"). She sought to recover damages and penalties for the Government on the grounds that it was fraudulently induced to pay out to dummy U.S. corporations controlled by Burmah Oil Company Limited ("Burmah") "in excess of $60,000,000" in ship construction subsidies granted by the Maritime Administration on the basis of false applications made by the dummy corporations in purported compliance with the Titles V and XI of the Merchant Marine Act of 1936 (46 U.S.C. §§ 1101 *et seq.*). (A.44). Section 232(A) of the False Claims Act vested the federal district court for the Southern District of New York with "full power and jurisdiction to hear, try and determine such suit," since substantially all of the respondents were found within the jurisdiction of the Southern District of New York. (A.17). The Petitioner alleged that "all the documents and



information" as listed on Schedule A to the Complaint were "not in the possession of the United States, the Attorney General thereof or any of its agencies or instrumentalities." (A.25).

In accordance with the False Claims Act, on September 30, 1976, Relator caused the verified complaint to be served on the United States Attorney for the Southern District of New York and a copy of the complaint accompanied by ten documents (or sets thereof), amassed by the Relator and listed on Schedule A to the complaint, to be transmitted, certified mail, to the Attorney General of the United States in Washington, D.C. (A.122).[1]

On December 2, 1976, the sixty-third day after the action was filed, the Government, by motion papers dated December 1, 1976 and entitled "Notice of Special Appearance and Motion to Dismiss", moved, purportedly pursuant to Section 232(C) of the False Claims Act [31 U.S.C. §232(C)] to dismiss for lack of jurisdiction, claiming that Relator's action "was based upon evidence or information in the possession of the United States . . . at the time . . . suit was brought."[2] (A.122).

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[1]This procedure is mandated by Section 232(C) of the False Claims Act, 31 U.S.C. §232(C). Schedule A to the Complaint is entitled:

> "STATEMENT OF DISCLOSURE ON BEHALF OF DOROTHY S. GREENBERG PURSUANT TO SECTION 232 (C) OF TITLE 31 OF THE UNITED STATES CODE", (A. 52);

and lists ten documents or sets thereof. These documents are sometimes herein referred to collectively as the "ten documents."

[2]Thirty-three of the thirty-five named respondents, all appearing by counsel, also moved to dismiss without supporting papers by a single Notice of Motion, dated December 6, 1976, relying on the Government's papers. The respondents had not answered, their time to move or answer having been extended to December 6, 1976 informally by correspondence.

The False Claims Act contains no express provision authorizing a special appearance. Nor do the Federal Rules of Civil Procedure. 5 Wright and Miller, *Federal Practice and Procedure, Civil* §1344 (1969).

*The Information Furnished the Government on September 30, 1976, by Relator.*

In addition to the Complaint, an original document outlining the details of the allegedly fraudulent transactions, Relator on September 30, 1976, sent to the Department of Justice the following documents and compilations:

1. An undated internal memorandum from the files of Burmah;

2. A Memorandum dated May 12, 1975 from Richard Kurrus ("Kurrus") to John J. McMullen ("McMullen") (A.55);

3. A second memorandum dated August 21, 1975 from Kurrus to McMullen;

4. A 63-page Memorandum of Law dated September 16, 1975, authored by the firm of Kurrus and Jacobi, Esqs.;

5. Two complaints prepared for and on behalf of Burmah for actions in the Supreme Court of the State of New York ["5(a)" and "5(b)" to Schedule A];

6. A folder of news releases[3] consisting of some 66 pages;

7. A Memorandum of Law relating to the self-dealing of respondent Elias J. Kulukundis ("Kulukundis"), Burmah's former Chief Executive Officer, authored by the law firm of Seymour & Patten, Esqs. (A. ); and

8. Two memoranda of interviews dated July 28, 1975 and November 14, 1975 with Kulukundis ["8(a)" and "8(b)" to Schedule A] (A.80, A.89).

[3]The news and magazine articles covered a range of subjects including Burmah's financial problems; Burmah's interest in the respondent Burmast East Shipping Corporation; cost overruns in connection with the construction of the LNG tankers involved in the fraud outlined by the Relator, etc.



Item 2 above, a highly material document conceded below to not be in the physical possession of the Government at the time of suit, is the full text of a three-page single-spaced internal confidential memorandum, dated May 12, 1975, from Richard W. Kurrus, attorney for the respondent Burmah, to its then Chief Executive Officer, Dr. John J. McMullen. (A.55) That document (referred to herein as the "Kurrus Memorandum") purports to memorialize the events occurring at two meetings between representatives of Burmah and MarAd,[4] on May 8, 1975, in which Burmah's attorney Mr. Kurrus participated and at which the fraudulent applications for ship construction subsidies and federal loan guarantees were discussed. One of the representatives present for MarAd was Robert J. Blackwell, "Maritime Administrator, Assistant Secretary of Commerce for Maritime Affairs." (A.55).

The Government contended that all of the information contained in the foregoing documents was in possession of the Government prior to September 30, 1976. In so arguing it relied on the fact that some of the information, but not all, was in the possession of (i) MarAd; (ii) Congressman Les Aspin; (iii) the Department of Justice; (iv) the Securities and Exchange Commissions; (v) the House Committee on Government Operations; and (vi) the General Accounting Office. It is undisputed that not one of the foregoing had assembled or analyzed all the information prior to September 30th; far less, had they everything (A.112-114).

[4]The Maritime Administration, sometimes herein, and in the Appendix, referred to as MarAd, is an agency in the Department of Commerce. It has the responsibility for passing upon applications for ship construction subsidies and loan guarantees under Titles V and XI of the Merchant Marine Act of 1936, *supra*. (A. 100-102).

**MarAd**

Relator contends (and so contended below) that MarAd was so intimately involved in the alleged fraud that its knowledge could not be imputed to the Government.

As to MarAd's alleged knowledge, the Government submitted an affidavit from MarAd's General Counsel, Samuel B. Nemirow. (A.100).[5] The Government contended below that MarAd was informed in 1975 of the underlying factual allegations upon which the Relator's Complaint was based and that "Relator has not presented any substantive information not known to MarAd prior to September 30, 1976." (A.101). However, MarAd did not have the Kurrus Memorandum. (A.112-114). Nor did it have Items 1, 3, 7, 8(a) and (b) of Schedule A. (*Ibid*). Nor had MarAd taken any action, even though Burmah itself was alleged to have notified MarAd of the underlying facts. (A.109-111).

MarAd claimed that it received the two New York Supreme Court complaints, documents 5(a) and 5(b) of Schedule A. (A.113). MarAd further claimed that it was aware of most of the newspaper and magazine articles, Item 6 of Schedule A (A.112-113). While MarAd concededly did not have in its physical possession the 63-page Memorandum of Law, authored in September, 1975 by the Kurrus law firm, its General Counsel claimed to have been "shown" it some time in September 1975. (A.111). As to whether he read or reviewed it, is not stated. (A.111).

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[5]Attorney Nemirow attended the first of two meetings memorialized by the Kurrus Memorandum. (A ). He did not attend the lunch later that day at which Administrator Blackwell is said to have acknowledged the fiction surrounding the transactions and to have urged that there be no public airing of the issues. (A. 58-59). The Government submitted no affidavit from Mr. Blackwell.



As to the Kurrus Memorandum, the Government argued that since it involved meetings with personnel of MarAd, MarAd had to have known what it contained. (A.113-114).

Elliott Richardson, then Secretary of Commerce, admitted, however, on November 17, 1976 that most of Relator's documents came to the attention of MarAd for the first time as a result of this action. See pages 11-12, *infra*.

**Congressman Les Aspin**

On May 25, 1976, Congressman Les Aspin (of Wisconsin) reported to the House that on March 3, 1976, he had written to Mr. Robert J. Blackwell, inquiring as to the propriety of MarAd's proposed financing of five ships for the use and transport of LNG from Indonesia to Japan.[6] Congressman Aspin told the House that the response from Mr. Blackwell, under date of April 21, 1976 "was totally unsatisfactory." *Congressional Record* — House, May 25, 1976, page 4909.

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[6]Burmah (through subsidiaries) entered into a Transportation Agreement on September 28, 1973 with an Indonesian state-owned company to carry LNG from Indonesia to Japan (the "Pertamina Transaction"). Companies known as the "Cherokee Companies" were allegedly set up in the United States by Burmah in order to secure U.S. financing for construction of the vessels necessary to fulfill the agreement. (See Complaint, ¶35, A. 42).

The Pertamina Transaction has been totally recast since the filing of the complaint. As recast, the respondent General Dynamics Corp. on January 19, 1977 received from MarAd a $727 million loan guarantee for the purpose of constructing five to seven ships to convey LNG between Indonesia and Japan. The grant of these guarantees in January 1977 to say the least has been controversial. See *The New York Times* of January 31, 1977, p. 20, the editorial "Of Ships and Contracts, with Envy?" Janeway, "Lame Duck Legacy Left by Richardson", *The Washington Star* of January 30, 1977; "The Outrageous General Dynamics Loan Guarantee" (Remarks of Senator Proxmire) in *The Congressional Record*, S.2207-08 (Feb. 3, 1977).

Congressman Aspin inserted into the Record that correspondence of March 3rd and April 21st, as well as a letter he had written under date of May 25, 1976, to Congressman Jack Brooks. Chairman of the House Committee on Government Operations.

On August 19, 1976, Congressman Aspin, presumably having had no satisfactory response from MarAd, wrote to then Attorney General Edward Levi, complaining of the matter, forwarding to the Justice Department an article from the New York Times of August 19th and his correspondence with Robert Blackwell, writing:

> Today the *New York Times* reported that several agencies are investigating the application of the Burmah Oil Company for Title XI mortgage insurance guarantees for the construction of 8 LNG tankers at General Dynamics, Quincy, Mass. facility.
>
> According to the *New York Times*, a memorandum of law prepared by a firm acting for one of Burmah's subsidiaries flatly states that affidavits of corporate citizenship submitted to the Maritime Administration "were fraudulent."
>
> If this information is accurate, it surely constitutes prima facie evidence that some parties may be involved in an effort to obtain Title XI guarantees through fraud.
>
> I am writing to you today to request that the Department of Justice undertake an *immediate investigation* of any possible fraud in connection with this case. It is obvious that we cannot tolerate anyone under any circumstances providing the Maritime Administration with fraudulent information. [emphasis ours].[7]

[7]The letter from Congressman Aspin was referred to by the Department of Justice but not produced.



Some forty-eight days later, under date of October 7, 1976, Assistant Attorney General Thornburgh, acknowledged the Congressman's letter. He wrote, in part, as follows:

> You specifically mention and request investigaiton of possible fraud in the submission of affidavits of corporate citizenship to the Federal Maritime Administration in order to obtain the Title XI guarantees. In this connection we understand both the Administration and the Securities and Exchange Commission are inquiring into this matter. I am, therefore, communicating with both of these agencies requesting all pertinent information. Upon receipt of that data, a determination will be made as to what further action would be appropriate by the Department.

The Relator's data, however, had already been received on October 4th, by the Department of Justice; and neither MarAd nor the Securities and Exchange Commission had all of Relator's data; nor had either agency made public or communicated to the Department of Justice, any findings.

Congressman Aspin, presumably not having had a response to his August 19 letter from the Justice Department, wrote under date of October 2nd, complaining of the matter to Secretary of Commerce Richardson. Secretary Richardson responded at length on November 17, 1976, and in part referred to the pendency of this action (filed some 48 days before), as follows:

> As you may be aware, the forfeiture contention is currently the subject of civil litigation in federal district court in New York. *In this civil action, most* of the documents which have been the basis for media reports, such as *The New York Times* article of August

> 19, *have been brought to light* and as a consequence, MarAd has recently been able to review these documents — *most of them for the first time.* Nothing in them, including the "legal memorandum" by Richard Kurrus, would lead MarAd to change its belief that the LNG vessels are not subject to forfeiture. [emphasis ours].[8]

Thus Secretary Richardson conceded that certain of Relator's documents had never before come to the attention of MarAd and that as a consequence of Relator's action MarAd "has recently been able to review" them, and "most of them for the first time."[9]

**The Department of Justice**

The Department of Justice prior to September 30, 1976 had only (i) Congressman Aspin's remarks in the Congressional Record and (ii) the *New York Times* article of August 19th, presumably obtained as a result of the Congressman's letter of August 19th (A.11).

The letter of Assistant Attorney General Thornburgh to Congressman Aspin of October 7th establishes that as of that date the Department of Justice was relying upon MarAd's and the SEC's inquiries into the matter and is an admission that it

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[8]The "legal memorandum" was item 4 to Schedule A of Relator's complaint.

[9]Secretary Richardson's admission contradicts the sworn affidavit of Samual B. Nemirow, General Counsel of MarAd. (A. 111-114).



had not prior thereto commenced an investigation. See page 11, *supra*.

Of course on October 4th, the Department of Justice had received Relator's complaint and the ten documents, mailed on September 30th. But the SEC had none of these documents. (A.124-128).

Under date of April 9, 1975, Deputy Assistant Attorney General Leon Ulman in the Office of Legal Counsel of the Department of Justice, had sent a "Memorandum" to Dudley Chapman, Associate Counsel at the White House. When he submitted that Memorandum he had none of the documents which Relator furnished or which the Government claimed to have in its possession prior to September 30, 1976. And of course he did not have the Kurrus Memorandum.

**The Securities and Exchange Commission**

The Commission "had none of the material information" prior to September 30, 1976. (A.11). A staff member of the Commission, on October 18, 1976, after the filing of this action, requested Relator's counsel to furnish the Commission copies of the documents listed on Schedule A. That request was referred by Relator to the Department of Justice. (A.126-7).

On September 8, 1976, the Commission had issued an order directing a private investigation "In the Matter of Burmah Oil Company, Ltd." and on September 24 and 27, 1976 issued *subpoenae duces tecum* to various individuals and corporations. The "acts or practices" allegedly being investigated

> . . . concern Burmah's relationship to various persons and entities including Energy Transportation Corporation and certain of its subsidiaries, involved in financing and chartering certain vessels to be used in the transport of LNG.

But it had not yet received any documents. It is a fair inference that the SEC received the Complaint and the documents listed on Schedule A thereof as a result of the filing of this action. (A.126-7).

**The House Committee on Government Operations [The "Brooks Committee"] (A.119-120)**

In a response dated November 29, 1976 to a letter dated October 22, 1976 of inquiry from the Department of Justice, sent after the filing of this action, the Brooks Committee had in its possession five of the ten documents, namely those listed as numbers 1, 3, 4, 5(a) and 5(b) on Relator's Schedule A. It did not have the Kurrus Memorandum nor items 6, 7, 8(a) and (b) of Schedule A. (A.119-120).

On August 2nd, the Brooks Committee asked the General Accounting Office to review certain of the issues. On August 3rd, Chairman Brooks inquired of Administrator Blackwell as to certain aspects of the Pertamina transaction. See page 9, m.6, *supra*.

In June 1976 and subsequent thereto but prior to September 30th, staff members of the Brooks Committee allegedly met with officials of MarAd "on at least 5 occasions." (A.115).

But by August, the Brooks Committee had still not made a determination. In a News Release it stated

> The House Committee on Government Operations has received certain allegations concerning the General Dynamics Liquified natural gas tanker program, and has had some discussions about them with the Maritime Administration, Congressman Jack Brooks (D-Tex.), Chairman of the Committee, said today.
>
> 'On the basis of these discussions, it has not yet been determined whether there is need for further committee action,' Brooks said.
>
> The Committee has requested further information from the Maritime Administration and has asked the General Accounting Office to review the entire ship construction loan guarantee program as it is presently being operated. The committee is awaiting responses to these requests.
>
> Copies of the letters to the Maritime Administration and General Accounting Office are attached.



**The General Accounting Office ("GAO")**

This office did not have the Kurrus Memorandum.

While Attorney General Thornburgh referred in his October 7th letter to this agency, the Government did not contend below that that agency had any of the information supplied by Relator. MarAd did apparently turn over to the GAO its records involving the Easco (A.31) and Pertamina Transactions (A.115), but not any of the Relator's documents.

**The New York Times Article of August 19, 1976 (A.59).**

This article was sent to the Department of Justice by Congressman Aspin on August 19, 1976. It was also contained in Item 6 to Schedule A of the complaint. This article appeared on the front page of the *Times* under the headline

"BURMAH OIL'S AID BID STUDIED FOR POSSIBLE FRAUD"

The article quotes Robert J. Blackwell as stating that his agency, MarAd,

> 'has no information to indicate that there was fraud of any type or wrongdoing' in the Burmah applications.[10]

On page 60 of the *Times*, the article is continued. In the second column the following is reported:

> Internal corporate documents from Burmah and confidential memoranda obtained by the New York Times pertaining to Burmah's situation show that serious questions over the legality of the guarantees and subsidies were raised by lawyers 11 months ago.
>
> One memorandum prepared by the firm of Kurrus & Jacobi, says: 'The continued involvement of those companies in the ship construction contracts will create a cloud on the title of the vessels and could subject them to forfeiture to the United States.' Some $476 million is involved in these contracts alone.
>
> The memorandum, dated September 16, 1975, said the financing arrangements 'present some extremely perilous legal problems for Burmah.' It suggested that 'forfeiture of the vessels to the United States would obviously have devastating consequences.' (A.63-4).[11]

The *Times* article then discusses the Kurrus Memorandum:

> Other documents obtained by The Times indicate that officials of the Maritime Administration may have been aware that violations of Federal law might

[10]The Kurrus Memorandum contradicts.

[11]The reference is to the 63 page Memorandum of Law, item 4 to Schedule A of Relator's complaint.



> have been committed in connection with the Burmah guarantees and subsidies.
>
> In a memorandum to John J. McMullen, former president of Burmah Oil Tankers, Richard Kurrus of the Washington law firm reported that he had engaged in a conversation about Burmah on May 8, 1975, with Mr. Blackwell, the Assistant Secretary of Commerce, and Samuel Nemirow, assistant general counsel of the Maritime Administration.
>
> Mr. Kurrus reported that he met with Mr. Blackwell for lunch later the same day and Mr. Blackwell said he felt that Elias J. Kulukundis [sic], an earlier president of Burmah Oil Tankers, 'may have acted imprudently and perhaps even improperly in the deals he set up.'
>
> Mr. Kurrus quoted Mr. Blackwell as saying that he was aware that problems had arisen over the Title XI financing and that 'everyone recognized' that the formal arrangement approved by the Maritime Administration 'was based on friction [sic].'
>
> Asked about this, Mr. Blackwell acknowledged he had met with Mr. Kurrus on May 9, not May 8, 1975, and that they had discussed Burmah's problems. However, he flatly denied that he ever said that the financing arrangements had been 'based on fictions.' (A.64-5)

There are no further quotations from the three-page Kurrus Memorandum. The remaining reference in the Time article to the Kurrus Memorandum was —

> Mr. Kurrus expressed shock yesterday when informed that a copy of his memorandum had been obtained by the Times. When asked if he wanted it read back to him, he replied, 'Don't read it. I don't want to be trapped. That's too dangerous.' (A.65)

**What the Government Did Not Know**

Nowhere in the moving affidavits submitted by the Government was it even suggested that prior to September 30, 1976, the Government was aware of the alleged complicity of MarAd and that Administrator Blackwell of that agency

> . . . recognized the weakness in the theory as to how these deals were established and that this is what worried him about a full fledged legal controversy between Burmah and Energy. [Kurrus Memorandum, A.59].

On September 30, 1976, neither the Department of Justice, the Securities and Exchange Commission, the General Accounting Office, nor any other investigative or prosecutorial agency of the Executive Branch of the Government had Relator's documents, except for the August 19th *New York Times* article.

**Disposition of the Relator's Action**

The District Court entered an Order and Final Judgment, dated January 6, 1977 and entered January 10, 1977 (A.15), in accordance with its unreported Memorandum Opinion dated December 22, 1976, (A.10) dismissing the Relator's *qui tam* action on jurisdictional grounds. The Court's basis for the dismissal was its interpretation of Section 232 (C) of the False Claims Act [31 U.S.C. §232(C)] and its conclusion that Relator's action was "based upon evidence or information in the possession of the United States, or an[y] agency, officer or employee thereof, at the time such suit was brought." *Ibid.* (A.11).

In its Memorandum Opinion of December 22, 1976, the District Court found that all *but one* of the ten documents submitted by Relator to the Government were, prior to September 30, 1976, in possession of the Government — either the Maritime Administration,[12] the House of Representatives' Committee on Government Operations, or the Department of Justice. In making its determination, the District Court adopted one position of Relator urged below, to the effect that because of the alleged complicity of MarAd, knowledge and information in MarAd's possession may not be imputed to the Government. (A.12). Nonetheless, the Court found that all of the substantive evidence or information presented by Relator was in possession of other agencies of the Government, including a Congressional Committee, prior to the filing of this action and the Court therefore dismissed for lack of jurisdiction. (A.12).



With regard to the Kurrus Memorandum, Judge Knapp found as follows:

> The one new document which the relator claims to have brought to the Government's attention is a memo-

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[12]The Court found that:

> The Maritime Administration had all of the information except for the Kurrus Memorandum. The Administration had obtained certain information relating to possible self-dealing by Elias J. Kulukundis from a complaint filed in New York State Supreme Court rather than the documents subsequently supplied by the relator. The House Committee on Government Operations had substantially the same information as the Maritime Administration. The Committee did not, however, have the folder of newspaper clippings compiled by the relator.
>
> The Securities and Exchange Commission had none of the material information. The Department of Justice had only the *New York Times* articles and Congressman Aspin's remarks in the *Congressional Record*. [A. 11].

Respondent Kulukundis was the former Chief Executive Officer of Respondent Burmah and was the immediate predecessor of John J. McMullen, the original recipient of the Kurrus Memorandum. (A. 55).

randum by a lawyer named Richard Kurrus from which it might be inferred that certain officials of the Maritime Administration knew about the alleged fraud, and perhaps that they were condoning it. The relator argues that this memorandum in itself constitutes substantial information and also that it warrants our concluding that the Maritime Administration was sufficiently involved in the scandal so that we should disregard any documents or information it possessed in making our determination. [A.12].

As for the claim that the Kurrus Memorandum constitutes substantial information, we so assume for present purposes. We note, however, that it was specifically identified and fully described in an August *New York Times* article. As a result, the information it contained was public knowledge. A copy of the article was in the files of the Justice Department. The information was therefore in the Department's possession and the memorandum itself would inevitably have been acquired by the Department in the course of its investigation had it been considered important. [A.12].[13]

As shown under Reason I, *infra*, the Kurrus Memorandum was not "fully described" in the *New York Times* article. Further, as of September 30, 1976 (i) there had been no public legal proceeding or action instituted by the United States, or

[13]In its brief in support of its Motion to Dismiss below, the Government argued and conceded that: "There are . . . only 4 documents submitted by Relator that the United States did not have in its possession prior to commencement of this action . . . The first of these, item 2 on Schedule A, is a three-page memorandum dated May 12, 1975, from Richard Kurrus to John J. McMullen . . . (the 'Kurrus Memorandum').

• • • •

The remaining three documents, items 7, 8(a) and 8(b), are a memorandum of law concerning alleged self-dealing of Elias Kulukundis and memoranda of conversations with Elias Kulukundis and N.J.D. William, an official of Burmah." Government's Memorandum of Law in Support of . . . Motion to Dismiss, dated December 2, 1976, pp. 16-17. See also Nemirow Affidavit ¶¶35, 36. (A. 113-114).



any agency thereof, arising out of the alleged facts contained in Relator's complaint; (ii) there had been no indictments or grand jury proceedings; and (iii) there had been no Congressional hearings, in public or private session, or Congressional investigation, other than preliminary Congressional inquiries.

The Government contended however in oral argument before the District Court on December 10, 1976, the return day of the motion, and subsequently in a post-argument reply affidavit, that the Department of Justice was then currently conducting an investigation. If so, this Department of Justice investigation was commenced after Relator's suit was instituted on September 30, 1976.

The United States Court of Appeals for the Second Circuit affirmed the District Court's dismissal of the Relator's suit on jurisdictional grounds and held in a *per curiam* opinion that that Judge Knapp's finding that the information supplied by the Relator was in the possession of the United States Government was "amply supported by the record." (A.6). The Second Circuit indicated that the fact that the Government did not have physical possession of all of the documents supplied by the Relator was not significant since: "The Government's possession of the material information contained in the Memorandum is enough under the statute to divest the Court of jurisdiction." (A.6)

As to the information disclosed by the Relator in the materials delivered to the United States Attorney for the Southern District of New York, the Second Circuit was of the opinion that: "Here, no new information concerning either the existence or the nature of the fraud was disclosed as a result of Relator's efforts." (A.6). The Relator's timely application for re-

hearing and rehearing en banc was denied on July 1, 1977. (A.9).

The carefully documented, thoroughly investigated complaint in this action presents a complex set of factual allegations[14] raising novel issues of law never before squarely presented for judicial determination. At its heart is an allegedly massive fraud perpetrated by subterfuge on the Government in connection with applications for loan subsidies and guarantees obtained by the principal respondents under Titles V and XI of the Merchant Marine Act of 1936 (46 U.S.C. §§1101, *et seq.*) and the United States Shipping Act of 1916, as amended (46 U.S.C. §801, *et seq.*). (A.121-128).

## REASONS FOR GRANTING THE WRIT

### I.

THE ERRONEOUS APPLICATION OF THE JURISDICTIONAL PROVISIONS OF THE FALSE CLAIMS ACT BY THE COURTS BELOW SHOULD NOT BE ALLOWED TO PREVENT A THOROUGH JUDICIAL EXAMINATION OF A MAJOR FRAUD BEING PERPETRATED UPON THE UNITED STATES GOVERNMENT BY A FOREIGN CORPORATION WHICH HAS AVAILED ITSELF OF UNITED STATES FINANCING FOR SHIP CONSTRUCTION PURPOSES, CONTRARY TO THE MERCHANT MARINE ACT OF 1936, BY ORGANIZING DUMMY CORPORATIONS IN THE UNITED STATES WHICH HAVE APPLIED FOR AND

[14]The present proceeding involves an order of dismissal and accordingly the allegations of the complaint must be accepted as true. *Carr v. Learner*, 547 F.2d 135 (2d Cir. 1976). 5 Wright and Miller, *Federal Practice and Procedure, Civil* §1350, pp. 551-553 (1969).



SECURED CONSTRUCTION DIFFERENTIAL SUBSIDIES AND FEDERAL GUARANTEES OF DEBT OBLIGATIONS THAT ARE ONLY AVAILABLE TO U.S. CITIZENS.

**A. The Kurrus Memorandum was not "fully described" in the New York Times August 19 article, and accordingly the dismissal for lack of jurisdiction was clearly erroneous.**

The Government had *The New York Times* article. It did not have the Kurrus Memorandum. *The New York Times* abridgment (A.59) and the full text of the Kurrus Memorandum (A.55) speak for themselves. The District Court's conclusion based on its comparison of the two documents, that the three-page, single-spaced Kurrus Memorandum was "fully described" in the *Times* article and the Second Circuit's affirmation thereof were clearly erroneous. (A.12).

The Kurrus Memorandum was indeed identified in the *Times* article, but only two of that document's important points were quoted — that Mr. Kulukundis "may have acted imprudently and . . . improperly" and that the arrangement approved by MarAd "was based on friction" [sic]. Furthermore, these points were taken out of context, so that their complete meaning was not apparent.

Highly material disclosures of factual matters contained in the Kurrus Memorandum were not reported by the *Times*. The principal omission is Blackwell's suggestion that Burmah engage in a cover up, i.e. Blackwell "warned about a full fledged legal controversy between Burmah and Energy," which would lead to exposure of wrongdoing. A.59).[15]

[15]The article also omitted the alleged admission of Mr. Blackwell ". . . that there appears to be several things basically wrong with the overall structure of this deal . . ." (A. 59).

In short, the Kurrus Memorandum contains admissions by Burmah through its counsel of the alleged fraud that were not reported by the *Times*. ***Without the Kurrus Memorandum there was no documentary evidence of MarAd's complicity!*** See Paragraph "38" of the Complaint. (A.44-5).

The relevant portion of the Kurrus Memorandum, dealing with the second of two meetings, is as follows: [only the italicized words were quoted in the *Times* article].

> I met with Mr. Blackwell for lunch on the same day. We had a further discussion of the Burmah-Energy problem. I explained to Mr. Blackwell that we could understand the function of the Energy companies under the Title XI insurance financing, but that the role of the Energy companies beyond that was impossible for us to understand or justify. Mr. Shelby, as I understand it, came into this deal as a lawyer representing Burmah. He and Messrs. Chen and Cuneo have put together the Energy companies and their subsidiaries in order to meet the legal requirements of United States ownership and control of (a) the company having the bareboat charter from the owner-lessor, under the leverage lease arrangement and (b) the company holding temporarily the shipbuilding contracts until permanent financing on the Cherokee I-V vessels can be arranged.
>
> People having the substantial interest in a project which Messrs. Shelby, Chen and Cuneo claim usually provide something of substance. Either they have been finders, they have invented something or devised the project, put together the financing under difficult circumstances or brought the indespensible [sic] parties to the deal together. Messrs. Shelby, Chen and Cuneo appear to have done none of these



> things. They rather appear to us to be capitalizing on their special position under the Title XI financing and taking this further to create a vested equity interest in the deal that cannot be justified. I explained to Blackwell that we could not at this time understand the consideration for any commitment to Messrs. Shelby, Chen and Cuneo beyond the Title XI financing arrangements and that the primary purpose of a meeting with them would be to afford them an opportunity to explain what consideration, if any, on their part did exist.
>
> I also explained that we had some serious problems concerning actions that Messrs. Shelby, Cuneo and Chen were taking that appeared to be in conflict with Burmah's interest. In this respect, I pointed out that they seem to have a continuing business association with Mr. Elias Kulukundis. Furthermore, Messrs. Shelby, Cuneo and Chen are now pursuing, according to our information their own private LNG project or projects which involve General Dynamics, Pertamina and possibly other companies who are integral and essential parts of the Burmah project. I emphasized that we do not have all of the facts but that if the Energy people are acting in the ways that we have heard, they would be in our opinion violating legal obligations which they owe to Burmah and would be acting improperly and illegally by interfering with Burmah's business relationships to which they have been introduced while they were ostensibly acting on Burmah's behalf.
>
> I also pointed out that this was not a situation where the Energy people had supplied any significant capital investment on their own. All expenses, costs and fees have been paid by Burmah. Under these circumstances, Burmah we

feel has a legal right to prevent the Energy people from assuming any larger or different role than their involvement as a conduit in the Title XI financing arrangement contemplated.

Mr. Blackwell stated that he could appreciate this problem but that it was obviously not Marad's problem. He said that he felt that Mr. Kulukundis *may have acted imprudently and perhaps even improperly in the deals he set up*, but that Burmah had permitted him to operate, had given him a cover of authority and had perhaps even countenanced the deals.

I explained that the real problem [sic] *vis a vis* the Energy people arose because of the special legal problems concerning the Title XI financing and that *everyone recognized* that the structure that Marad had approved in this deal (and in other similar deals such as Maritime Fruit Carriers, Ultamar, Shell, A. J. Chandris, etc.) *was based on a fiction*. He said that he recognized the weakness in the theory as to how these deals were established and that this is what worried him about a full fledged legal controversy between Burmah and Energy.

I explained that we obviously were not interested in provoking such a legal battle if it could reasonably be avoided, but the way that this deal is presently structured is an unviable and impossible situation for Burmah. If we cave in to the Energy people, we would in a real way be submitting to blackmail. Furthermore, there is a valid argument I believe that the Energy people would be permitted to profit unduly and unconscionably through a United States Government contract.



Mr. Blackwell admitted that there appears to be several things basically wrong with the overall structure of this deal that should be rectified if possible. He agreed that Burmah must take its own actions to place this deal on a sound legal as well as economically feasible basis. I asked him to bear with us in attempting to work out these problems and stated that we would keep him informed of developments. [A.55-58]

Hence, the District Court's findings that the Kurrus Memorandum was "fully described" in the *Times* article and therefore "public knowledge" and that its contents constituted substantive evidence in possession of the Government prior to September 30, 1976, were clearly erroneous, and should not have been affirmed by the Second Circuit. Without such an erroneous finding, Relator could not have been denied jurisdiction to prosecute her claims. *United States v. Rippetoe*, 173 F.2d 735 (4th Cir. 1949); *United States et rel. Vance v. Westinghouse Electric Corp.*, 363 F.Supp. 1038 (W.D. PA. 1973).

Judge Knapp assumed in his opinion that the Kurrus Memorandum constituted substantial new information contributed by Relator which was not in the possession of the Government at the time Relator filed suit. (A.12). This assumption and the District Court's finding that the Kurrus Memorandum contained information "... from which it might be inferred that certain officials of the Maritime Administration knew about the alleged fraud, and perhaps that they were condoning it," (A.12) precluded, as a matter of law, dismissal for failure to meet the jurisdictional requirements. This finding is even more incomprehensible in the light of the District Court's other finding that evidence of MarAd's complicity in the alleged fraud indicated in the Kurrus Memorandum is not "information in the

possession of the Government."[16] The finding that the Government did not possess the Kurrus Memorandum at the time the suit was filed required the District Court to deny the motion to dismiss.

In its *per curiam* opinion affirming the decision of the District Court below, the Second Circuit held that: "The Government's possession of the material information contained in the Memorandum is enough under the statute to divest the Court of jurisdiction." (A.6) The Second Circuit was of the opinion that the Relator supplied "... no new information concerning either the existence or the nature of the fraud . . ." (A.6), and went on to indicate in a footnote that although the Kurrus Memorandum revealed the complicity of the Maritime Administration in the alleged fraud, that nonetheless this information was clearly disclosed in the New York Times article (A.6-7). The Second Circuit's comparison of the information contained in the *New York Times* article and in the Kurrus Memorandum is overly simplistic and wholly inaccurate. The *Times*' allegation that MarAd officials "may have been aware of the fraudulent scheme" can hardly be equated in terms of significance with the detailed revelation of complicity contained in the memorandum itself:

He [Blackwell] said that he recognized the weakness in

[16]The District Court also erroneously found that MarAd was in possession of Items 7, 8(a) and 8(b) to Schedule A. (A. 11 n. 1). The Government conceded that MarAd was not in possession of these documents on September 30, 1976. Nemirow affidavit, ¶35 (A. 113). These documents substantiate the problems Burmah was having with its former chief executive officer, Kulukundis, and his alleged disloyalty to Burmah, which are also alluded to in the Kurrus Memorandum (A. 69 to A. 100).



the theory as to how these deals were established and that this is what worried him about a full fledged legal controversy between Burmah and Energy.

* * *

Mr. Blackwell admitted that there appears to be several things basically wrong with the overall structure of this deal that should be rectified if possible [A.59].

The Government did not possess the Kurrus Memorandum at the time Relator filed suit and hence the findings of the Courts below that the Government possessed all of the "evidence or information" upon which the Relator's suit was based were clearly erroneous. The jurisdictional barrier posed by Section 232(C) of the False Claims Act should not have been erected in the present proceeding.

Indeed as to items 7, 8(a) and 8(b) which the Relator provided and which were admittedly not in the Government's possession (A.113) the Second Circuit held in a footnote to its opinion that these documents were of little or no relevance to the alleged fraud. (A.6-7) One can only wonder how a legal ruling as to the relevance or materiality of a particular document could be made when there had been no discovery by which to develop the facts underlying the allegedly fraudulent scheme. To assert that certain of the documents the Relator provided were irrelevant when only affidavits and motions were before the District Court, was utterly premature. The ramifications and significance of the allegedly fradulent scheme could not be calculated or measured until discovery had been had by all interested parties and the known facts had been aired and examined at a judicial hearing. Unfortunately, the ramifications of the fraudulent scheme alleged by the Relator will re-

main unexplored and unknown because of the erroneous invocation of the jurisdictional provisions of the False Claims Act by the courts below.

## II.

## THE JURISDICTIONAL PROVISIONS OF THE FALSE CLAIMS ACT SHOULD NOT BE INTERPRETED AND APPLIED IN A MANNER WHICH BARS ACCESS TO THE FEDERAL COURTS BY A PRIVATE CITIZEN HAVING POSSESSION OF MATERIAL DOCUMENTS AND INFORMATION EVIDENCING THE PERPETRATION OF A MAJOR FRAUD AGAINST THE UNITED STATES GOVERNMENT.

A. The Second Circuit's interpretation of section 232(C) of the False Claims Act and its application thereof to the present action sound a death knell for the *Qui Tam* Action.

The Government did *not* establish, as is required by Section 232(C) of the Act, as a prerequisite to dismissal, that it was in possession of *all "evidence or information"* submitted by Relator. Nor could it. The Government's moving papers, on the contrary, reveal *that the Government did not have all the substantive information, did not have all the documents, and did not have all the evidence.* What it did have was not organized or assembled and was scattered throughout the "vastness" of the Washington federal establishment. *Cf. Bateson-Stolte, Inc. v. The United States,* 305 F.2d 386 at 388 (Ct. of Claims 1962).

To be sure, certain of the information was buried in the archives of various federal agencies. It was, however, disorganized and not analyzed nor integrated — an all too familiar problem. Congressman Aspin had been repeatedly frustrated



by MarAd's "unsatisfactory" replies to his inquiries, a task made far more onerous by that agency's obvious desire to cover up its own complicity. (A.59). Even the Department of Justice moved slowly until after the filing of this action. Only after Relator's Complaint and the ten documents were filed with the Justice Department did it take action, prompted by the fact that it was then faced with a statutory duty to respond within sixty days. 31 U.S.C. §232(C).[17] The complex facts disclosed by Relator's Complaint had not previously been accessible to any one agency of the Government. These facts are like a jigsaw puzzle composed of many pieces, with missing parts. Relator took these pieces, laboriously added the missing pieces, and in her complaint portrayed a clear picture which had not been seen or examined before by a disinterested agency of the Government.

Significantly, the fact that the Government did not possess the Kurrus memorandum has remained unchallenged throughout the proceedings below. Yet, the District Court and apparently the Second Circuit were of the opinion that the material information in the Kurrus memorandum was "fully described" (A.12) in *The New York Times* article of August 19, 1976, and hence that the Relator failed to provide the Government with any new or significant information when it provided the Government with the Kurrus Memorandum (A.6).

*The New York Times* article simply asserts that "Officials of the Maritime Administration may have been aware that violations of Federal law might have been committed in connection with the Burmah guarantees and subsidies." (A.64)

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[17]It actually responded on the sixty-third day. Query: Why hadn't the Justice Department moved earlier?

The presence of the *Times* article in the files of the Justice Department can hardly be equated with possession of the significant information contained in the Kurrus Memorandum which was admittedly not in the Justice Department's files at the time the Relator filed her suit. Before a federal district court can be divested of jurisdiction, under the False Claims Act, Section 232 (C) it must be made to appear that such suit was based upon "[E]vidence or information in the *possession* of the United States or any agency, officer or employee thereof, at the time such suit was brought". (Emphasis added) The fact that the Justice Department's files contained a newspaper article alleging possible awareness on the part of certain MarAd officials of the alleged fraud does not justify nor does it lead *a fortiori* to the conclusion that the Government was in possession of all significant and specific factual information concerning the fraud and the extent of MarAd's complicity therein.

Daily newspapers throughout the United States are filled with stories about alleged schemes, plots, scandals and swindles involving the Government or Government officials. The retention by the Justice Department or any Governmental agency of each and every newspaper story alleging the existence of a scandal, scheme or swindle involving the Government and the existence of clandestine memoranda in connection therewith will, according to the Second Circuit, divest a federal district court of jurisdiction with regard to any *qui tam* action prosecuted by a private citizen who does, in fact, possess one of the clandestine memoranda. Such a simplistic interpretation and application of Section 232 (C) by the Second Circuit totally disregards the specificity, materiality and significance of the information possessed by the private citizen. Such an interpre-



tation and application of the jurisdictional provisions of The False Claims Act is also directly contrary to the purpose of the Act and literally serves to bar any private United States citizen from instituting a *qui tam* action no matter how great the fraud, if a suspicious newspaper reporter prints his theories and ideas regarding the fraud several days before the private citizen files suit, and the newspaper article has been placed in the files of a Governmental agency.

The reference in the *Times* article to the Kurrus memorandum apparently led the District Court to conclude that the Justice Department would inevitably have secured the document although it was not in the Department's possession at the time the Relator filed suit. (A.12)[18] The Second Circuit apparently felt that the additional information in the Kurrus memorandum regarding the complicity of MarAd officials was adequately covered in the *Times* article *supra*. Yet it is difficult to perceive how the Justice Department's possession of a newspaper clipping with an extremely vague synopsis of the document in question can be equated in significance with the actual physical possession of the document containing the specific information.

Unfortunately, the Second Circuit has chosen to interpret and apply Section 232 (C) of the False Claims Act in this manner and accordingly has chosen to restrict and severely limit the ability of private citizens to bring forward mate-

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[18]The New York Times, on occasion has opposed subpoena for documents in its possession. See *Branzburg v. Hayes*, 408 U.S. 665 (1972). Attorney Kurrus would have been obliged to raise the attorney-client privilege inasmuch as the Burmah respondents themselves in this action attempted to preserve that claim.

rial documents evidencing the perpetration of major frauds against the United States Government. Once a newspaper reporter enunciates his ideas and theories in his column as to alleged improprieties and clandestine memoranda, and the story is placed in the files of a governmental agency, a *qui tam* action by a private citizen possessing one of the clandestine memoranda is effectively barred.

Congress realized that granting private citizens the right to sue to recover Government monies paid out as a result of fraudulent claims would be an important check on bureaucratic abuses — in certain carefully restricted circumstances — and a valuable adjunct to governmental prosecutorial activity. Compare *J. I. Case Co. v. Borak*, 377 U.S .426, 434, 84 S.Ct. 1555, 12 L.ed.2d 423 (1964); *Grace v. Ludwig*, 484 F.2d 1262; 1267 (2d Cir. 1973), *cert. den.* 416 U.S. 905 (1974).

The False Claims Act is remedial in nature and has been interpreted by the Supreme Court broadly; *United States v. Bornstein*, 423 U.S. 303, 96 S.Ct. 523, 46 L.Ed. 2d 514 (1976); *United States v. Neifert-White Co.*, 390 U.S. 228, 88 S.Ct. 959, 19 L.Ed. 2d 1061 (1968; *United States ex rel. Marcus v. Hess*, 317 U.S. 536, 63 S.Ct. 379, 87 L.Ed. 443 (1943); and remedial statutes must be construed to effectuate the purpose intended. *S.E.C. v. Capital Gains Research Bureau, Inc.*, 375 U.S. 80, 195, 84 S.Ct. 275, 11 L.Ed.2d 337 (1963); *J. I. Case v. Borak, supra*, at 433. *Cf. Abrahamson v. Fleschner*, .... F2d. ..... [Current] CCH Fed. Sec. L. Rep. ¶95,889 at pages 91273-91274 (2d Cir. 1977). A writ of certiorari should therefore be issued to correct the Second Circuit's erroneous interpretation and application of the False Claims Act and to



breathe vitality back into its provisions as Congress had intended.

B. The Second Circuit has erroneously expanded the jurisdictional barrier posed by Section 232 (C) of The False Claims Act beyond the limits intended by Congress.

As is evident from a review of the Act's legislative history, Congress in amending the False Claims Act in 1943, did not intend to deny access to the Courts, except *where it was clear that a relator was merely copying public information*. A denial of access here is in effect a denial of a remedy, which should not be countenanced.

There is nothing novel about frauds on the United States Government. The Courts and commentators recognize that the original impetus for the Act was the widespread fraud in making claims in connection with the supply of goods and services to the federal government during the Civil War. The purpose of the Act was to encourage the apprehension of profiteers by providing reasonable financial incentives to private parties to expose and prosecute frauds against the Government. *United States v. Bornstein, supra* at 309-310, n.5; *U.S. ex rel. Marcus v. Hess, supra* at 544; *Rainwater v. United States*, 356 U.S. 590, 592 (1958); *U.S. v. McNinch*, 356 U.S. 595 at 599 (1958); *See* Note, *Qui Tam Suits Under the Federal False Claims Act: Tool of the Private Litigant in Public Actions*, 67 NORTHWESTERN U.L. REV. 446 (1972).

"The Supreme Court has said that the congressional purpose behind the False Claims Act was to 'protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made.' *Rainwater v.*

*United States, supra,* 356 U.S. at 592, 78 S.Ct. at 948. In short. the purpose was to stop the 'plundering of the public treasury.' *United States v. McNinch, supra,* 356 U.S. at 599, 78 S.Ct. at 950. While it is clear that the False Claims Act was not designed to reach every kind of fraud practiced on the United States, *United States v. McNinch, supra,* at 599, 78 S.Ct. 950; . . . it is equally clear that its purpose was to reach 'all fraudulent attempts to cause the Government to pay out sums of money.' *United States v. Neifert-White Company, supra,* 390 U.S. at 233, 88 S.Ct. at 962." [*United States v. Silver,* 384 F. Supp. 617, 619 (E.D. N.Y. 1974), aff'd 515 F.2d 505 (2d Cir. 1976).]

The pattern of widespread corruption which led to the passage of the Act in 1863 mushroomed during World War II, leading to a significant amount of litigation under the Act. *See,* 67 NORTHWESTERN U.L. REV., *supra,* at 455. Among these was a new breed of suit which became known as the "parasitic" False Claims Act suit. These were cases where, following a criminal indictment for defrauding the federal government, private litigants merely copied, frequently *in haec verba,* the indictment and findings of the grand jury into their own civil complaints. The Justice Department found itself forced to prepare its own civil complaints prior to obtaining any indictment in order to win the race to the courthouse. 89 *Cong. Rec.* 7571, 7572 (1943).

One of these cases led to the 1943 amendments to the Act. That case, *Marcus v. Hess, supra,* involved the rigging of bids by electrical contractors on Pittsburgh Public Works Administration projects. The Third Circuit denied recovery to the private litigant on the ground that Congress, when it enacted the



statute, did not intend to reward those who merely copied government indictments. 127 F.2d 233 (1942).

This Honorable Court reversed, and found that the Act did not specifically require that the private litigant contribute any new information. The purpose of the Act was to encourage private suits to recover money from those who would "cheat the United States", and this purpose was not inconsistent with piggybacking on government indictments. The decision concluded that only Congress, and not the Supreme Court, could change the law so as to prohibit so-called "parasitic" civil actions. 317 U.S. at 544-46.

Mr. Justice Jackson dissented and argued that Congress did not intend to reward private litigants unless they based their suit on information not in the possession of the Government. His argument was predicated upon an analysis in an *amicus* brief which had been submitted by the Department of Justice.

After that decision, then Attorney General Biddle sent a memorandum to Congress to revise or entirely eliminate the *qui tam* provisions of the False Claims Act. See S. Rep. No. 291, 78th Cong., 1st Sess. (1943). Biddle said that the competitive scramble with private litigants was impairing the ability of the Justice Department effectively to prosecute fraud against the Government. He said the Government no longer needed private attorney generals as it had in 1863, when the statute was enacted. By the end of 1943, approximately 250 suits seeking damages totalling $144 million had been filed by private litigants. See 89 *Cong. Rec.* 7581, 7572, and 10,845-46 (1943).

Congress responded by enacting the amendments of 1943. In March of that year the House of Representatives passed H.R. 1203, entitled "A Bill to Eliminate Private Suits for Penalties

and Damages Arising Out of Frauds against the United States," which would have entirely proscribed *qui tam* actions. This bill was rejected by the Senate. The bill which ultimately was passed into law merely limited *qui tam* actions, at the same time severely reducing the share of any recovery to which the private litigant would be entitled. See 89 *Cong. Rec., supra,* at 7571-80 and 7596-97 *passim.* The 1943 Act, therefore, reaffirmed a continuing Congressional belief in the efficacy and usefulness of *qui tam* actions, while controlling certain abuses which had grown along the fringes of the original legislation.

When in March of 1943, the House of Representatives had passed H.R. 1203, the House's action was substantially without debate. 39 *Cong. Rec.* 7577 to 7578 (1943).

Thereafter the Senate Committee on the Judiciary, Chaired by Senator Van Nuys, introduced into the Senate a modified version designed to eliminate the *qui tam* suit only under certain conditions. See Sen. Rep. No. 291, 78th Cong. 1st Sess. (1943). Even these conditions were subsequently liberalized after debate and conference committee action by the Senate and House.

## THE SENATE DEBATES ON H.R. 1203

Senator Van Nuys of Indiana, Chairman of the Committee of the Judiciary, offered an amendment to Section 3491 of the Revised Statutes (31 U.S.C. §232) which would have ousted the Court of jurisdiction if the relator's suit was not

> "based upon information, evidence, and sources *original with such person* and not in the possession of or obtained by the United States in the course of any investigation or proceeding instituted or conducted by it." [emphasis added]



He offered in detail Attorney General Biddle's views. 89 *Cong. Rec.* pp. 7570-7572.

Thus at pages 7571 and 7572, Chairman Van Nuys was concerned about copying from public government proceedings:

> In other words, the informer would have no personal knowledge of the facts at all, but would hurry to the courthouse as soon as a grand-jury indictment was returned in open court and copy verbatim the language of the indictment, changing the caption and the prayer from a criminal action to a civil action. [page 7571]

It was clearly his intent however to "protect bona fide, honest informers." 89 *Cong Rec.*, also at pages 7608-7609.[19]

There was substantial debate over the requirement that the information had to be "original" with the relator. *Ibid.* at 7573-7576, 7596-7597; and 7609-7614.

At page 7615 Senator Wheeler of Montana moved to strike out the language "original with such person" and stated that:

> If that is done, it seems to me it could eliminate one of the most objectionable features which has been complained of because then a citizen would not be confined to evidence which was original to him. Certainly in Court, no person should be confined to the proposition that all the evidence must originate with him and that if he obtains evidence from some other source he cannot use it. If that were true in any trial a great many suits could not be maintained. Certainly a man

[19] "Mr. VAN NUYS. Mr. President, taking up the bill at this time, and discussing it by sections, let me say that all of page 1, down to line 3 on page 2 ending with the word "suit" is written exactly in the words of the old law of 1863. *From there on we tried to protect bona fide honest informers.*" [emphasis added]

should be able to use any evidence he can procure, which is not in the possession of the United States, or does not originate from a grand jury investigation or an investigation by a committee of Congress, or something of that kind.[20]

Chairman Van Nuys agreed to adopt the foregoing amendment when it went to conference. *Ibid.* 7615-7616.[21] The Conference Report is found at page 10844 of Volume 89 of the *Congressional Record* and the debate in conection therewith is referred to in *United States ex rel. Vance v. Westinghouse Electric Corp.*, at pages 1041-1042, and particularly n.4 at page 1042.

From the foregoing, the intent of the Senate which, in contrast to the House, actively debated the bill, can be synthesized as follows: The Court should have jurisdiction even if the relator was not the original source of information, provided that a relator had not copied that information from some public proceeding. *U.S. ex rel. Ronald Davis, Plaintiff v. Long's Drugs Inc.*, 411 F.Supp. 1144 (S.D. Cal. 1976).

Indeed, the District Court in *U.S. Ex Rel Donald Davis, Plaintiff* expressly rejected the argument that Section 232(C) was designed to reach more than just those cases where the plaintiff "pirated his information from government sources":

"Defendants emphasize here the case of *United States v. Aster*, 176 F.Supp. 208 (E. D. Pa. 1959) *aff'd.* 275 F.2d 281

[20]Relator Greenberg while bringing to the attention of the Government evidence not original with her, that is, it apparently emanates from the files of Burmah and its representatives, did not copy from any grand jury investigation or from any investigation of a Congressional committee. For, at the time she filed, there had not been any.

[21]The amendment was adopted and the language deleted.



(3d Cir. 1959), . . . in arguing that section 232(C) was designed to reach more than just those cases where plaintiff pirated his information from government sources. This court has serious reservations though as to the validity of the *Aster* decision in light of the above legislative history which indicates that *Congress intented to eliminate only parasitical suits* and the recent opinion of the Supreme Court in *United States v. Neifert-White*, 390 U.S. 228, 88 S.Ct. 959, 19 L.Ed2d 1061 (1968). It would not appear consistent with the Congressional purpose to bar false claim actions brought on behalf of the government when the relator possesses *original* information which he has voluntarily turned over to the United States prior to commencing suit and the government declines to act to protect the public treasury. [Emphasis Added]

In contrast with the policy of section 232(C) to limit suits not based on original information, the policy underlying the principal section of the False Claims Act, section 231, is to protect the United States Treasury from all maner of fraudulent claims. The Supreme Court has recently held that the False Claims Act is to be liberally construed to further the policy of compensating the United States for fraudulent claims. The Supreme Court in *United States v. Neifert-White*, 390 U.S. 228, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968) examined the legislative history of the Act and stated:

> Debates at the time suggest that the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government. In its present form the Act is broadly phrased to reach any person who makes or causes to be made 'any claim upon or against' the United States . . . *In the various*

*contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil.* See, *e.g., United States ex rel. Marcus V. Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943).' (emphasis added). 390 U.S. at 232, 88 S.Ct. at 962."

[*U.S. ex rel. Ronald Davis, Plaintiff*, supra, at 1152.]

## THE RELATORS ACTION WAS NOT A PARASITIC ACTION

From the foregoing legislative history, it is clear that the 1943 edition of subsection C to Section 232 of the False Claims Act was designed to prevent the filing of "parasitic" actions, actions by parties who have no information of their own to contribute, and who merely plagiarize information in indictments returned in the courts, newspaper stories, or Congressional investigations. See *United States ex rel Sherr v. Anaconda Wire & Cable Co.*, 57 F.Supp. 196, 107-08 (S.D.N.Y. 1944) aff'd 149 F.2d 680 (2nd Cir.) cert. den. 326 U.S. 762 (1945). In the present action, specific and detailed information provided by the Relator by virtue of the Kurrus Memorandum can hardly be characterized as a plagiarization of the *New York Times* article of August 19, 1976. The Relator's action is, therefore, *not* a "parasitic" action which Section 232(C) was intended to prevent and should not have been dismissed. The Second Circuit's expansion of the jurisdictional barrier posed by Section 232(C) beyond the limits intended by Congress creates a dangerous precedent which will frustrate and discourage the filing of *qui tam* actions by bona fide informers who can provide the Government with documents which at the time of suit, are not in its possession. Such an unwarranted restriction of access to the federal



courts totally ignores this Honorable Court's directive to avoid a "rigid, restrictive reading" when confronted with a question regarding the proper construction of the False Claims Act, *United States v. Neifert White*, *supra*, 390 U.S. at 232, 88 S.Ct. at 962.

## III.

## THE DAMAGES TO THE UNITED STATES AND ITS TAXPAYERS ARE ALREADY SUBSTANTIAL. THE DOCUMENTARY EVIDENCE ESTABLISHES THAT RESPONDENTS KULUKUNDIS, CHEN AND BURMAH, AIDED AND ABETTED BY THE OTHER RESPONDENTS, ENGAGED IN A SUBTERFUGE TO DEFRAUD THE GOVERMENT AND TO CAUSE FALSE APPLICATIONS FOR FINANCING TO BE FILED WITH MARAD.

The essence of the alleged fraud is that deliberately false applications were submitted to MarAd, claiming that the applicants were United States citizens, when in fact they were not, inasmuch as they were controlled by Burmah (A.128-136).

The Government has already paid out $79 million in connection with ship construction financing for the Cryogenic Companies established by Burmah (A.34). See Paragraph 18 of the Nemirow Affidavit (A.106). The construction cost for the three vessels which are nearing completion is $280 million. Approximately $150 million of the foregoing is guaranteed under Title XI Financing. The United States has guaranteed the prompt payment in full of interest and unpaid principal in the event of default in payment of funds borrowed to

finance the construction. [Nemirow Affidavit ¶¶6 and 18] (A.102; 106)

If Burmah failed to meet the interest payments and other carrying charges of the loans as well as the principal thereof when they become due, the United States Government will in all likelihood have to make those payments. This is by no means a remote possibility, as Burmah today is not financially a healthy company. Its financial plight was referred to in a footnote on the first page of Exhibit 14 of the Government's moving papers:

> "Burmah Oil has been much in the news lately. The British Government was required to step in and guarantee a large part of Burham's dollar obligations in light of Burmah's large losses during the past year in its tanker operations. *See, N.Y. Times* (city ed), Jan. 3, 1975, p. 37, c.1; the *Wall Street Journal* (Eastern ed.), Jan. 3, 1975, p. 6, c.1."

Since that time Burmah has incurred increasing losses, reporting for the six months ended June 30, 1976 a loss after taxes of approximately thirteen and one-half million pounds or approximately $24 million.

If, in fact, Burmah controlled directly or indirectly by contract, understanding, arrangement or any other means the applicants for C.D.S. Financing or for Title XI Financing, i.e., the Cryogenic Companies in connection with the Easco Transaction or the Cherokee Companies in connection with the Pertamina Transaction, it must follow that false claims have been submitted to the Government.

The significance of this was not lost on Mr. Blackwell of MarAd in his private correspondence of May 1, 1975 with one of the parties in connection with the applications of the Cherokee Companies when he wrote:



> I have read with concern the recent exchange of correspondence between the Energy/Cherokee interests and Burmah Oil Incorporated. Many of the facts set forth in these letters do not comport with the understanding of the project held by the Maritime Administration nor in our view with the representations made to us when we considered and issued the commitment to guarantee obligations incurred in the financing of the five LNG vessels being constructed at General Dynamics. If the letters of April 18 and April 28 from Burmah are accurate reflections of the status of the parties, substantial doubt is created concerning compliance with the citizenship requirements of section 2 of the Shipping Act, 1916, as amended.
>
> Since Title XI guarantees are available only to persons qualified as United States citizens pursuant to section 2 who are in no way subject to control by non-citizen interests, will be necessary to immediately define with some degree of specificity the roles of the participants in this transaction.

Blackwell did not really want all the facts to come to light as is indicated by his exchange with Burmah's attorney on May 8th, reflected on page 3 of the Kurrus Memorandum.

> "I (Kurrus) explained that the real problem vis-a-vis the Energy people arose because of the special legal problems concerning the Title XI financing and that everyone recognized that the structure that MarAd had approved in this deal (and in other similar deals such as Maritime Fruit Carriers, Ultramar, Shell, A.J. Chandris etc.) was based on fiction. *He (Blackwell) said that he recognized the weakness in the theory as to how these deals were established and that this is what worried him about a full fledged legal controversy between Burmah and Energy.*
>
> I explained that we obviously were not interested in provoking such a legal battle if it could reasonably be avoided, but the way that this deal is presently struc-

tured is an unviable and impossible situation for Burmah. If we cave in to the Energy people, we would in a real way be submitting to blackmail. Furthermore, there is a valid argument I believe that the Energy people would be permitted to profit unduly and unconscionably through a United States Government contract.

Mr. Blackwell admitted that there appears to be several things basically wrong with the overall structure of this deal that should be rectified if possible." [Emphasis added—parenthetical material ours.]. (A.59).

Any doubt as to control by Burmah of the Cryogenic and Cherokee Companies as well as over the entire transactions is dispelled by the document entitled

"A Proposal to Japan Line, Ltd. for the Formation of a Transportation Joint Venture of Liquified Natural Gas", authored by the defendant Burmah Oil Tankers Limited, a Bermuda corporation and wholly owned subsidiary of Burmah with offices at 1185 Avenue of the Americas, New York, New York 10036 and dated May 29, 1975. (A.141).[22]

That document discusses the Pertamina and Easco transactions as follows:

"In addition to the five LNG carriers which are the principal subject of this suggested joint venture Burmah also has under construction three other LNG carriers also at General Dynamics, making a total of eight ships in all. At present the first second and fourth ships to be delivered are designated as the "Easco" ships and the remaining five ships considered in this proposal are designated as the "Cherokee" ships. In the case of the Easco ships, financing has been com-

[22]This document was not submitted by relator with the Complaint and Schedule A (A. 138).



pletely arranged and the first of the Easco vessels is scheduled for delivery in November, 1976. Because the financing has been arranged with Title XI and Construction Differential Subsidy ("CDS") has been approved for the Easco ships, they will be operated under U.S. flag conditions."

* * *

The proposal discusses the anticipated profitability of the transactions and the background. Burmah's control is substantiated in those sections of the proposal relating to Background, as follows:

"III BACKGROUND

All eight vessels are being constructed by the General Dynamics Shipbuilding Division at Quincy, Massachusetts. These vessels are now estimated for delivery from November 1976 to April 1979 at three to six month intervals.

The three Easco vessels were originally dedicated to the transportation of LNG from Algeria to the East Coast of the United States for a joint venture of two utilities ("Eascogas"). However, in July 1974 the Algerians rescinded the LNG sales contract underlying the transportation agreement. As a result of this action and the subsequent delay in formation of a new sales contract, Burmah has notified Eascogas that these ships could no longer be exclusively reserved for the Eascogas project. Instead, it is contemplated that these ships will be considered to fulfill the requirements of the transportation agreement which Burmah signed with Pertamina for the transportation of Indonesian gas to Japan. However, this is not definite and the possibility of a new transportation agreement with Easco is also being considered.

In addition to these vessels, Burmah Tankers has also caused an additional five identical ships to be contracted at General Dynamics to service the Pertamina Transportation Agreement, the basic terms and conditions of which are summarized in Section V of this proposal. This agreement provided a major advantage in that the Indonesian liquefaction plant is scheduled for completion in early 1977. In most LNG transportation projects, it is not unusual for the first vessel to be delivered and proceed directly into layup to await the completion of the liquefaction plant.

"The Easco ships are being constructed with Construction Differential Subsidies of $21,252,000 per ship and Title XI guaranteed financing provided by the U. S. Government. The remaining five have a preliminary commitment for U. S. Government Title XI construction financing and Construction Differential Subsidy is not contemplated. The U. S. Government provides these shipbuilding incentives with the requirement that the vessels be operated under U. S. registry with at least 51% U. S. ownership. As noted previously, registration under non-U. S. flag of the Easco ships would possibly require repayment of the construction subsidies. Even with repayment of subsidy the construction costs are less than $95,000,000 and could not be duplicated anywhere else in the world.

"As noted the construction and long-term financing for the Easco vessels has been arranged. The ownership of these three vessels rests in a financial group led by the First National City Bank and includes The First National Bank of Chicago and General American Transportation Corporation (GATX), a major transportation leasing company. In the case of the second series of five ships, neither the construction or long-



term financing arrangements are yet complete and at the present time, Burmah Oil is providing the funds for the construction of these five ships. Steps will soon be taken to arrange both the construction and long-term financing. Therefore, if non-U.S. flag operation is to be considered, a decision must be made before U.S. financing is finalized.

"While the details of ownership and operation are complex, all eight ships are, in one form or another, guaranteed by Burmah. Since Burmah is to be the long-term charterer of the ships, and it has guarantee construction financing and the time charter payments, that supports the long-term financing. Clarification of the various interrelationships can be provided. *At this time, it is sufficient to state that the purpose of the different corporations is to provide got [sic] U.S. construction benefiting for Title XI financing.*" [Emphasis Added]

## CONCLUSION

Both the interpretation and the application of the jurisdictional provisions of the False Claims Act by the courts below create a precedent which severely limits the ability of private citizens who possess material documents evidencing the perpetration of a major fraud against the U.S. Government from bringing to light and prosecuting on behalf of the Government those individuals who are responsible.

The Relator has shown that the Government has paid out over $60 million in subsidies which are illegally benefiting a foreign corporation. These subsidies amount to an illegal credit approximately three times that granted to the Lockheed Corporation, and unless the decisions of the courts below are reversed, the dismissal of the Relator's action stands as precedent for U.S. financing of foreign-owned tankers in direct violation of the Merchant Marine Act of 1936.

For the reasons stated, Petitioner prays that her Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

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— and —

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## PROOF OF SERVICE

Proof of service of three copies of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit upon each of the parties separately represented by counsel was filed by FRANK G. NEWMAN, a member of the Bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the petitions were filed.

APPENDIX

In the

# Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-492

UNITED STATES OF AMERICA

*Petitioner,*

by DOROTHY S. GREENBERG,
for herself as well as for the United States of America

*Relator-Petitioner*

— against —

THE BURMAH OIL COMPANY LIMITED, BURMAH OIL INCORPORATED, BURMAH OIL TANKERS LIMITED, BETHEL MARINE, INC., SOUTHHOLD MARINE, INC., VERMONT MARINE, INC., BURMAST EAST SHIPPING CORP., BURMAH GAS TRANSPORTATION LIMITED, ELIAS J. KULUKUNDIS, SUMMIT MARINE OPERATIONS, INC., SUMMITT I, INC., SUMMITT II, INC., SUMMITT III, INC., CHEROKEE I SHIPPING CORPORATION, CHEROKEE II SHIPPING CORPORATION, CHEROKEE III SHIPPING CORPORATION, CHEROKEE IV SHIPPING CORPORATION, CHEROKEE V SHIPPING CORPORATION, ENERGY TRANSPORTATION CORPORATION, C. Y. CHEN, JOSEPH J. CUNEO, JEROME SHELBY, CRYOGENIC ENERGY TRANSPORT, INC., LNG TRANSPORT INC., LIQUEGAS TRANSPORT INC., JAMES DURBIN, JOHN C. BULLITT, FIRST NATIONAL CITY BANK, CITICORP LEASING, INC., GENERAL AMERICAN TRANSPORTATION CORP., GENERAL DYNAMICS CORPORATION, CITIMARLEASE (BURMAH I), INC., CITIMARLEASE (BURMAH LNG CARRIER), INC., CITIMARLEASE (BURMAH LIQUEGAS), INC., and CITICORP.,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND COURT

## INDEX

## RELEVANT DOCKET ENTRIES

| *Date* | *Proceedings* |
|---|---|
| 9-30-76 | Filed Verified Complaint |
| 12-03-76 | Filed in Chambers, Affidavit of Samuel B. Nemirow |
| 12-03-76 | Filed Affidavit of Charles Franklin Richter |
| 12-23-76 | Filed Memorandum and Order dismissing the Complaint for lack of jurisdiction |
| 1-07-77 | Filed Affidavit of R. B. Dannenberg |
| 1-07-77 | Filed Supplemental Affidavit of R. B. Dannenberg |
| 1-07-77 | Filed Order and Judgment. Knapp J. Judgment Entered 1/10/77. |

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1166—September Term, 1976.

(Argued May 11, 1977 Decided May 11, 1977,
Opinion June 1, 1977.)

Docket No. 77-6022

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

by DOROTHY S. GREENBERG, for herself as well as for the United States of America,

*Plaintiff-Relator-Appellant,*

v.

THE BURMAH OIL COMPANY LIMITED, BURMAH OIL INCORPORATED, BURMAH OIL TANKERS LIMITED, BETHEL MARINE, INC., SOUTHHOLD MARINE, INC., VERMONT MARINE, INC., BURMAST EAST SHIPPING CORP., BURMAH GAS TRANSPORTATION LIMITED, ELIAS J. KULUKUNDIS, SUMMITT MARINE OPERATIONS, INC., SUMMITT I, INC., SUMMITT II, INC., SUMMIT III, INC., CHEROKEE I SHIPPING CORPORATION, CHEROKEE II SHIPPING CORPORATION, CHEROKEE III SHIPPING CORPORATION, CHEROKEE IV SHIPPING CORPORATION, CHEROKEE V SHIPPING CORPORATION, ENERGY TRANSPORTATION CORPORATION, C. Y. CHEN, JOSEPH J. CUNEO, JEROME SHELBY, CRYOGENIC ENERGY TRANSPORT, INC., LNG TRANSPORT INC., LIQUEGAS TRANSPORT INC.,



JAMES DURBIN, JOHN C. BULLITT, FIRST NATIONAL CITY BANK, CITICORP LEASING, INC., GENERAL AMERICAN TRANSPORTATION CORP., GENERAL DYNAMICS CORPORATION, CITIMARLEASE (BURMAH I), INC., CITIMARLEASE (BURMAH LNG CARRIER), INC., CITIMARLEASE (BURMAH LIQUEGAS), INC., and CITICORP.,

*Defendants-Appellees.*

Before:

LUMBARD and MESKILL, *Circuit Judges,*
and JAMESON, *District Judge.**

Appeal from an Order and Judgment of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge,* dismissing, for lack of jurisdiction, plaintiff-realtor's *qui tam* action brought pursuant to the False Claims Act, 31 U.S.C. §§ 231-235.

Affirmed.

* * *

PER CURIAM:

This is an appeal from an Order and Judgment of the United States District Court for the Southern District of New York,

* Hon. William J. Jameson of the District of Montana, sitting by designation.

Whitman Knapp, *Judge*, dismissing a *qui tam* action brought under the False Claims Act, 31 U.S.C. §§ 231-235, on the ground that relator failed to satisfy one of the jurisdictional prerequisites of that Act. The decision of the District Court was affirmed in open court. This opinion is being written at the request of relator. That request was joined in by the United States Attorney for the Southern District of New York.

The False Claims Act is designed to encourage the apprehension of profiteers by providing financial incentives to private parties to expose and prosecute fraud against the government. Relator seeks to recover damages and penalties for the United States and a reward for herself under the False Claims Act on the ground that the defendants, by means of fraudulent applications to the Maritime Administration, induced the government to pay out millions of dollars in construction differential subsidies under Title V of the Merchant Marine Act of 1936, as amended, 46 U.S.C. §§ 1151-1161, and to make construction loan guarantees under Title XI of the same act, 46 U.S.C. §§ 1271-1280. Applicants for Title V subsidies or Title XI guarantees must be United States citizens. The fraud of which relator complains involves an alleged failure, by the defendants, to meet these citizenship requirements.

On August 19, 1976, the front page of the *New York Times* contained the following news report:

> The Securities and Exchange Commission, the Federal Maritime Administration and at least one Congressional committee are investigating whether the Burmah Oil Company, a major British concern, illegally received commitments for Federal guarantees or subsidies to build at least eight huge tanker ships in this country.
>
> Hundreds of millions of dollars in shipbuilding projects and thousands of American shipyard jobs may be in jeopardy because of the possibility of fraud in applying for the Government backing, which is illegal for foreign companies under Federal Law.



The report went on to explain that the *Times* had obtained a memorandum from one Richard Kurrus, a lawyer for Burmah Oil, to the president of Burmah Oil, expressing concern over the fact that the applications were based on a "fiction."

Six weeks later, on September 30, 1976, relator filed her complaint in the Southern District of New York. As is required by 31 U.S.C. § 232(C), she served upon the United States a "disclosure in writing of substantially all evidence and information in [her] possession material to the effective prosecution of [the] suit." Of the ten documents, or sets of documents thus disclosed, only one, the Kurrus memorandum, was not already in the physical possession of the government.

31 U.S.C. § 232(C) provides that, "[t]he court shall have no jurisdiction to proceed with any [*qui tam*] *suit* . . . whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States . . .

---

1 In 1943, subsection (C) was added to section 232 of the False Claims Act. The change was made to discourage the filing of actions by parties having no information of their own to contribute, but who merely plagarized information in indictments returned in the courts, newspaper stories or congressional investigations. *See United States ex rel. Sherr* v. *Anaconda Wire & Cable Co.*, 57 F.Supp. 106, 107-08 (S.D.N.Y. 1944), *aff'd*, 149 F.2d 680 (2d Cir.), *cert. denied*, 326 U.S. 762 (1945).

at the time such suit was brought."[1] Inasmuch as the information in the *Times* report was public knowledge and a copy of the report was in the files of the Justice Department, Judge Knapp found that the information was in the possession of the United States, and he dismissed the relator's suit for lack of jurisdiction. Judge Knapp's finding was amply supported by the record.

Relator challenges Judge Knapp's finding that the government inevitably would have obtained the Kurrus memorandum itself in the course of its investigations. We need not examine that deduction. The government's possession of the material information contained in the memorandum is enough under the statute to divest the court of jurisdiction.

We also reject relator's theory that the district court could take jurisdiction over this suit on the basis of her public service in assembling, organizing and integrating the information in the government's possession. The statute is clear and explicit. Jurisdiction is defeated by the government's possession of the information. Only where the process of organization produced new information, such as the disclosure of the existence or nature of a fraud, could it arguably provide a sufficient predicate for jurisdiction. Here, no new information concerning either the existence or the nature of the fraud was disclosed as a result of relator's efforts.[2]

Finally, we need not decide whether the government's motion to dismiss this action was timely. Because the issue involved

The decision of the district court is affirmed.

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2 Relator claims that the Kurros memorandum revealed the complicity of the Maritime Administration in the alleged fraud, thus disclosing vital information about the nature of the fraud. Assuming that the



here relates to the court's jurisdiction, no motion by any party was necessary. The court could have raised the issue *sua sponte*.

---

complicity of the Maritime Administration would be relevant, this information was clearly disclosed in the Time article, which states that documents obtained by the Times, including the Kurros memorandum, "indicate that officials of the Maritime Administration may have been aware that violations of Federal law might have been committed in connection with the Burmah guarantees and subsidies."

Further, in a footnote to her brief, relator points to three other documents she provided, which were not in the government's possession. After examining these documents, however, we conclude that they are of little or no relevance to the alleged fraud and that prior to the institution of relator's action the government already was in possession of a document containing whatever information of value these documents might arguably provide.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of July, one thousand nine hundred and seventy-seven.

Present:

HON. J. EDWARD LUMBARD,

HON. THOMAS J. MESKILL,

*Circuit Judges*

HON. WILLIAM J. JAMESON,

*District Judge*

Docket No. 77-6022

UNITED STATES OF AMERICA,

*Defendants-Appellees*

DOROTHY S. GREENBERG,

*Plaintiff-Relator-Appellant*

*v.*

THE BURMAH OIL CO., etc.,

*Defendants-Appellees*

A petition for a rehearing having been filed herein by counsel for the appellant, DOROTHY S. GREENBERG,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO, Clerk



UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of July, one thousand nine hundred and seventy-seven.

Docket No. 77-6022

UNITED STATES OF AMERICA, etc.,

*Plaintiff-Appellee*

DOROTHY S. GREENBERG,

*Plaintiff-Relator-Appellant*

*v.*

THE BURMAH OIL CO., etc.,

*Defendants-Appellees*

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, DOROTHY S. GREENBERG, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN, Chief Judge

MEMORANDUM AND ORDER OF
JUDGE WHITMAN KNAPP
DATED DECEMBER 22, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

UNITED STATES OF AMERICA, by Dorothy S. Greenberg, for herself as well as for the United States of America,

*Plaintiff,*

— against —

THE BURMAH OIL COMPANY LIMITED, et al.,

*Defendants.*

MEMORANDUM AND ORDER
76 Civ. 4351

KNAPP, D.J.

The United States has entered a special appearance in order to bring this motion to dismiss the complaint for lack of jurisdiction. We grant the motion.

The relator Dorothy S. Greenberg filed this *qui tam* action on September 20, 1976 in the name of the United States pursuant to 31 U.S.C. §232(B) of the False Claims Act. According to the allegations of the complaint, the defendants conspired to make false statements concerning the citizenship of two sets of applicants for subsidies and loan guarantees from the Maritime Administration. A jurisdictional prerequisite of the False Claims



Act, contained in §232(C), is that the evidence or information supporting the complaint be unknown to the Government prior to the commencement of the action. The Government contends that the jurisdictional requirement has not been met.

The alleged fraud which the relator seeks to redress was the subject of an inquiry in March, 1976 by Congressman Les Aspin. In May, 1976, the Congressman referred the matter to the House Committee on Government Operations and to the Department of Justice; both commenced investigations. In early September the SEC began its own inquiry into the corporate transactions involved. Moreover, in August the alleged scandal was brought to the public's attention by a series of articles published in the *New York Times*, and was subsequently carried by other newspapers.

Pursuant to §232(C) of the Act, the relator submitted to the Department of Justice copies of all documents — ten in number — upon which she based her complaint. With possibly one exception those documents, or the information contained in them, were within the actual possession of one or another government body before the complaint was filed.[1] Nevertheless, the relator has urged several theories by which we should maintain jurisdiction.

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1 The Maritime Administration had all of the information except for the Kurrus memorandum. The Administration had obtained certain information relating to possible self-dealing by Elias J. Kulukundis from a complaint filed in New York State Supreme Court rather than from the documents subsequently supplied by the relator. The House Committee on Government Operations had substantially the same information as the Maritime Administration. The Committee did not, however, have the folder of newspaper clippings compiled by the relator.

The Securities and Exchange Commission had none of the material information. The Department of Justice had only the *New York Times* articles and Congressman Aspin's remarks in the *Congressional Record*.

The one new document which the relator claims to have brought to the Government's attention is a memorandum by a lawyer named Richard Kurrus from which it might be inferred that certain officials of the Maritime Administration knew about the alleged fraud, and perhaps that they were condoning it. The relator argues that this memorandum in itself constitutes substantial information and also that it warrants our concluding that the Maritime Administration was sufficiently involved in the scandal so that we should disregard any documents or information it possessed in making our determination.

As for the claim that the Kurrus memorandum constitutes substantial information, we so assume for present purposes. We note, however, that it was specifically identified and fully described in an August *New York Times* article. As a result, the information it contained was public knowledge. A copy of the article was in the files of the Justice Department. The information was therefore in the Department's possession, and the memorandum itself would inevitably have been acquired by the Department in the course of its investigation had it been considered important.

As for the claimed complicity of the Maritime Administration, we can of course express no views on the basis of the record before us. However, for purposes of the instant motion we adopt the relator's position and disregard the information possessed by the Administration.

The other government body which before the relator filed this complaint had in its files most of the relevant information was the House Committee on Government Operations. The relator maintains that we should disregard the Committee's knowledge, urging us to construe the Act as referring to information



in the possession only of the executive branch of the government, presumably because only the executive branch can take legal action to prosecute and redress fraud. We have found no authority that so limits the False Claims Act. Indeed, other courts have, in passing, included Congress in their consideration of whether the jurisdictional requirements of the Act have been met. *See* e.g. *United States ex rel Sherr v. Anaconda Wire and Cable Co.* (S.D.N.Y. 1944) 57 F.Supp. 106, 108 *aff'd* (2d Cir. 1945) 149 F.2d 680.

Essentially, the relator is suggesting that but for her activities Congressman Aspin and the House Committee might well have been frustrated, and the results of their investigations ignored. In so arguing she misconstrues the purpose of the False Claims Act. The Act was designed to encourage citizens to come forward with information of which the Government might be ignorant. It was not designed to permit citizens to call upon the courts to supervise the manner in which the Government deals with information it already has. *Cf. United States ex rel Thompson* v. *Hays* (D. D.C. 10/30/76) Civil Action No. 76-1140, *United States ex rel Martin-Trigona* v. *Ford* (D. D.C. 10/28/76) Civil Action No. 76-1374; see the legislative history of the Act discussed in *U.S. ex rel Sherr* v. *Anaconda, supra,* and *U.S. ex rel Vance* v. *Westinghouse Electric Corp.* (W.D. Penn. 1973) 363 F.Supp. 1038.

Accordingly, we dismiss the complaint for failure to comply with the jurisdictional requirement.

Pursuant to a stipulation between the Government and the defendants, the court has temporarily sealed certain documents filed in connection with this motion. There seeming to be no purpose in containing the secrecy, the order sealing those docu-

ments is vacated. So it may be clear that no defendant is waiving any claim of privilege, let it be recited that this order of vacature is made *sua sponte* over defendants' protest.

Settle order.

Dated: New York, New York
December 22, 1976.

WHITMAN KNAPP, U.S.D.J.



## ORDER AND JUDGMENT OF DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA, by Dorothy S. Greenberg, for herself as well as for the United States of America,<br>*Plaintiff*,<br>— *v* —<br>THE BURMAH OIL COMPANY LIMITED, et al.,<br>*Defendants.* | RELATOR'S PROPOSED COUNTER-ORDER<br>&<br>76 Civ. 4351 (WK)<br>JUDGMENT |

The Court having considered the papers filed in connection with the motion to dismiss for lack of jurisdiction made herein by the United States of America, which has specially appeared in this action, and having concluded in its Memorandum and Order of December 22, 1976, that the Court lacks jurisdiction pursuant to 31 U.S.C. §232(C) and that its order of December 2, 1976, concerning certain documents filed with the Court in connection with such motion should be vacated,

NOW, upon motion of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York and attorney for the United States of America,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED: (1) the clerk shall enter judgment against Plaintiff Relator

Dorothy S. Greenberg dismissing this action without costs; and (2) the Court's order of December 2, 1976, is vacated in its entirety and the clerk is directed not to place under seal any of the documents that have been filed in conection with this action.

Dated: New York, New York

January 6, 1977

WHITMAN KNAPP, U.S.D.J.

JUDGMENT ENTERED 1/10/77
Clerk

## STATUTORY PROVISIONS INVOLVED

### The False Claims Act
### 31 U.S.C. §§231, *et seq.*

§231. Liability of persons making false claims

Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll,



account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

§232. Same, suits; procedure

(A) The several district courts of the United States, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the United States attorney, first filed in the case, setting forth the reasons for such consent.

(C) Whenever any such suit shall be brought by any person under clause (B) of this section notice of the pendency of such suit shall be given to the United States by serving upon the

United States attorney for the district in which suit suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: *Provided,* That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) of this section. The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however,* That no abatement shall be had as to a suit pending on December 23, 1943, if before such suit was filed such person had in his possession and



voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.

* * * * *

(E)(1) In any such suit, if carried on by the United States as herein provided, the court may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought. Any such award shall in no event exceed one-tenth of the proceeds of such suit or any settlement thereof.

(2) In any such suit when not carried on by the United States as herein provided, whether heretofore or hereafter brought, the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, as provided in clause (B) of this section, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount, not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonable expenses as the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable

for all costs incurred by himself in such case and shall have no claim therefor on the United States.

§233. Duty of United States attorney as to such cases

It shall be the duty of the several United States attorneys for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section 231 of this title by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of $2,000, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

§234. Repealed. Dec. 23, 1943, c. 377, §2, 57 Stat. 609

§235. Limitation of suit

Every such suit shall be commenced within six years from the commission of the act, and not afterward.

*The United States Shipping Act of 1916*, 46 U.S.C. Section 802.

(a) Within the meaning of this chapter no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of



the number necessary to constitute a quorum are noncitizens and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof but in the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum.

(b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a ctizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or, (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to 75 per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if 75 per centum of the voting power in such corporation is not vested in citizens of the United States; or (c) if, through any contract or understadning, it is so arranged that more than 25 per centum of the voting power in such corporation may

be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

Sept. 7, 1916, c. 451, § 2, 39 Stat. 729; July 15, 1918, c. 152, § 2, 40 Stat. 900; June 5, 1920, c. 250, § 38, 41 Stat. 1008; Sept. 21, 1959, Pub.L. 86–327, § 3, 73 Stat. 597.



## VERIFIED COMPLAINT

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, by Dorothy S. Greenberg, for herself as well as for the United States of America,

*Plaintiff,*

— against —

THE BURMAH OIL COMPANY LIMITED,
BURMAH OIL INCORPORATED,
BURMAH OIL TANKERS LIMITED,
BETHEL MARINE, INC.,
SOUTHHOLD MARINE, INC.,
VERMONT MARINE, INC.,
BURMAST EAST SHIPPING CORP.,
BURMAH GAS TRANSPORTATION LIMITED,
ELIAS J. KULUKUNDIS,
SUMMITT MARINE OPERATIONS, INC.,
SUMMITT I, INC.,
SUMMITT II, INC.,
SUMMITT III, INC.,
CHEROKEE I SHIPPING CORPORATION,
CHEROKEE II SHIPPING CORPORATION,
CHEROKEE III SHIPPING CORPORATION,
CHEROKEE IV SHIPPING CORPORATION,
CHEROKEE V SHIPPING CORPORATION,

VERIFIED COMPLAINT

ENERGY TRANSPORTATION CORPORATION,
C. Y. CHEN,
JOSEPH J. CUNEO,
JEROME SHELBY,
CRYOGENIC ENERGY TRANSPORT, INC.,
LNG TRANSPORT INC.,
LIQUEGAS TRANSPORT INC.,
JAMES DURBIN,
JOHN C. BULLITT,
FIRST NATIONAL CITY BANK
CITICORP LEASING, INC.,
GENERAL AMERICAN TRANSPORTATION CORP.
GENERAL DYNAMICS CORPORATION,
CITIMARLEASE (BURMAH I), INC.,
CITIMARLEASE (BURMAH LNG CARRIER), INC.,
CITIMARLEASE (BURMAH LIQUEGAS), INC. and
CITICORP

*Defendants.*

VERIFIED COMPLAINT

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Plaintiff for herself as well as for the United States of America, by her attorneys, LIPPER, LOWEY & DANNENBERG and BURTON L. KNAPP, and NEWMAN, SHOOK & NEWMAN, for her complaint, alleges upon information and belief, except with respect to the allegations contained in Paragraph 4 which are alleged upon knowledge.



**Jurisdiction and Venue**

1. This action arises under the United States statute known as The False Claims Act, 31 U.S.C. §§231-233, 235 for deliberate violations of and under the United States "Shipping Act 1916," as amended, 46 U.S.C., §801 et seq. and for deliberate violations of and under the Merchant Marine Act of 1936, as amended, 46 U.S.C. §1101, et seq.

2. Jurisdiction rests under Section 31 U.S.C. §232(a), as substantially all of the defendants are found within the jurisdiction of the Southern District of New York. All of the documents and information contained therein, listed on Schedule A annexed, are not in possession of the United States, the Attorney General thereof, or any of its agencies or instrumentalities.

3. The claims asserted herein arise out of acts and transactions in furtherance of the violations that have occurred in substantial part within the Southern District of New York.

**The Parties**

4. Plaintiff Dorothy S. Greenberg, a citizen of the United States and a resident of the City, County and State of New York, brings this action for herself as well as for the United States of America.

5. The Burmah Oil Company Limited ("BOCL") is a corporation organized and existing under the laws of Scotland. BOCL is an international oil company engaged in various branches of the petroleum industry, including the transportation of crude oil and natural gas. It does business in the United States including within the Southern District of New York, and has a place of business at 1185 Avenue of the Americas, New York,

New York. At times it has conducted certain of its business through the New York City law firm of Simpson Thacher & Bartlett. BOCL borrows substantial monies from United States banks, including those located within the Southern District of New York.

6. The defendant Burmah Oil Incorporated ("Burmah Oil") is a wholly owned subsidiary of BOCL, and is a Delaware corporation, havings its principal place of business at 1185 Avenue of the Americas, New York, New York.

7. (a) The defendant Burmah Oil Tankers Limited ("Burmah Tankers") is a wholly owned subsidiary of BOCL, incorporated under the laws of Bermuda, and having its principal place of business at 1185 Avenue of the Americas, New York, New York. (Unless otherwise alleged, BOCL, Burmah Oil and Burmah Tankers are hereinafter referred to collectively as "Burmah.").

(b) The defendants Bethel Marine, Inc., Southhold Marine, Inc. and Vermont Marine, Inc. (the "Marine Companies") are Delaware corporations which are affiliates or wholly owned subsidiaries of one or more of the Burmah Corporations, with their principal offices at 1185 Avenue of the Americas, New York, New York, and were formed solely to act as "dummy" time charterers of certain vessels as more particularly hereinafter alleged at paragraphs "31" through "35", *infra*.

8. The defendant Burmast East Shipping Corp. ("Burmast") is a Liberian corporation and a majority owned subsidiary of Burmah Tankers with an office in New York, New York; defendant Burmah Gas Transportation Limited ("BGT") is a



Liberian corporation and wholly owned subsidiary of Burmah Oil, with an office in New York, New York.

9. Defendant Elias J. Kulukundis, a resident of the City of New York, at all relevant times until January 1974 was Chairman of the Board, Chief Executive Officer and a controlling shareholder of Burmah and dominated these corporations; he is the former President of Burmah Tankers. His present business address is 630 Fifth Avenue, New York, New York.

10. (a) Each of the defendants Summitt Marine Operations, Inc., Summitt I, Inc., Summitt II, Inc. and Summitt III, Inc. (the "Summitt Companies") and each of the defendants Cherokee I Shipping Corporation through Cherokee V Shipping Corporation (the "Cherokee Corporations") are Delaware corporations with their principal places of business c/o Energy Transportation Corporation, 540 Madison Avenue, New York, New York.

(b) The Summitt Companies and Cherokee Companies were organized at the direction of Burmah and Kulukundis by certain New York City law firms.

(c) Prior to November 1973, John C. Bullitt ("Bullitt"), a partner of Shearman and Sterling ("S and S") and a New York resident and citizen, was the President of each of the Cherokee Companies and was held out as the owner of all the then outstanding common stock (500 shares) of each of the Cherokee Companies. The other officers and directors of each of the Cherokee Companies were also members of S and S.

(d) Bullitt had no real individual interest in the Cherokee Companies, but held the stock as nominee for and as an accommodation to Burmah. Bullitt understood that he would

dispose of the stock of the Cherokee Companies in accordance with instructions of Kulukundis and that said stock was owned and held by him subject to the control and direction of Burmah.

(e) In November 1973 upon the directions of Kulukundis and Burmah, all of the common stock in each of the Cherokee Companies was transferred by Bullitt to Eli Ellis ("Ellis"), a partner in the New York city law firm of Hill Bets and Nash, and subsequently by him upon the directions of Kulukundis and Burmah to the defendant Energy Transportation Corporation ("Energy").

11. (a) Defendant Energy is a Delaware corporation with its principal place of business at 540 Madison Avenue, New York, New York, and is a holding company for the Summitt Companies and the Cherokee Companies.

(b) Defendant C. Y. Chen is Chairman of the Board and Chief Executive Officer of Energy and maintains an office in New York City. Chen and members of his family own 80% of the common stock of Energy.

(c) Chen is a long time business associate of Kulukundis and often partner and joint venturer with him.

(d) Energy was organized by Chen in agreement with Kulukundis to act as a holding company for United States citien operating companies that were in fact not bona fide operating companies but would act solely in contravention of law for the benefit of Burmah in the attempt to obtain subsidies and guarantees from the United States of America as more particularly hereinafter alleged, including the Summitt Companies and the Cherokee Companies.

(e) Defendant Joseph J. Cuneo, a citizen of the State of



New York, is President of Energy, the Summitt Companies and the Cherokee Companies, and maintains an office at 540 Madison Avenue, New York, N. Y.

(f) Defendant Jerome Shelby ("Shelby") is a citizen of the State of New York, is Vice President and General Counsel of Energy, a stockholder thereof, and maintains an office for the practice of law in New York City with the law firm of Cadwalader, Wickersham & Taft, which firm also acts as counsel to the Summitt Companies.

12. Defendants Cryogenic Energy Transport, Inc., LNG Transport, Inc. and Liquegas Transport, Inc. (the "Cryogenic Companies") are corporations organized under the laws of the State of Delaware. The entire capital stock of the Cryogenic Companies was initially owned by defendant James Durbin, a United States citizen, who at the times was Chairman of the Board of Burmah Tankers and a director of other companies which were subsidiaries and/or affiliates of BOCL, Burmah Oil and/or Burmah Tankers. Shelby at all relevant times acted as agent for the Cryogenic Companies.

13. (a) Defendant Citicorp, a Delaware Corporation, is a diversified financial services organization and is the parent of the defendants First National City Bank, a national banking corporation; Citicorp Leasing, Inc.; Citimarlease (Burmah I) Inc., Citmarlease (Burmah LNG Carrier), Inc. and Citimarlease (Burmah Liquegas), Inc., all Delaware corporations, all with offices at 399 Park Avenue, New York, N. Y. (Said defendants are hereinafter collectively referred to as "FNCB").

(b) FNCB are engaged directly or indirectly through

wholly owned subsidiaries in the business, among others, of financing ship construction.

(c) S and S are counsel for FNCB and have at times acted as counsel for Burmah.

14. Defendant General American Transportation Corp. ("General American") is a New York corporation with a principal office at 380 Madison Avenue, New York, New York and, among other businesses, engages in financing of ship construction.

15. General Dynamics Corporation ("Dynamics") is a Delaware corporation with its principal executive office at St. Louis, Missouri and is engaged, through its Quincy, Massachusetts shipbuilding division, in the construction of liquefied natural gas tankers for commercial use and in the overhaul and repair of commercial and naval vessels.

16. The defendants named herein are not in the military or naval forces of the United States of America or in the militia or called into or actually employed in the service of the United States.

**Background and History of Underlying Transactions and the Conspiracy to Deliberately Defraud the United States Government**

17. At some time in 1972 Burmah decided to enter into the business of ocean transportation of liquefied natural gas ("L.N.G.").

18. L.N.G. is natural gas converted by pressure and cooling to a liquid state at a temperature of minus 259°F. As a liquid, it occupies approximately 1/600th of its volume as a gas and



can be economically shipped over long distances in specially designed ships ("vessels").

19. Burmah in 1972 did not have the necessary vessels and had to acquire them. Burmah concluded to have ships constructed for them.

20. On or about June 26, 1972 Burmah concluded its first agreement for the transportation of L.N.G. Burmah entered into a Transportation Agreement with a joint venture of Public Service Electric & Gas Company of New Jersey and Algonquin Gas Transmission Company (collectively referred to as "Easco"). That Easco Transportation Agreement required Burmah to furnish from three to five of L.N.G. vessels to transport L.N.G. from Africa (Algeria) to the East Coast of the United States (New York and New Jersey based terminals) for a period of twenty-two years.

21. On or about September 23, 1973, Burmah, acting through Burmast, entered into a second Transportation Agreement. Pursuant to a Transportation Agreement with Perusahaan Perlamagangan Minjah Dan Gas Bumi Negara ("Pertamina"), an Indonesian national oil and gas company Burmah through Burmast agreed to furnish up to eight of L.N.G. vessels to transport L.N.G. from Indonesia to Japan for a period of twenty years.

22. At the time Burmah entered into the Easco Transportation Agreement, Burmah and Kulukundis determined that the vessels should be built in a United States shipyard so as to attempt to take advantage of and attempt to benefit from

(i) United States Construction-Differential Subsidies

("C.D.S. Financing"), authorized under Title V of the Merchant Marine Act of 1936 (46 U.S.C. §§1151-1161), and

(ii) United States Guaranteed Loans under Title XI of the Merchant Marine Act of 1936 ("Title XI Financing") (46 U.S.C. §§1271-1276).

23. (a) Only citizens of the United States, as defined in the United States Shipping Act, 1916 and under the Merchant Marine Act of 1936 are eligible for C.D.S. Financing or for Title XI Financing. This fact was known to Burmah and Kulukundis in 1972. Further, they knew that C.D.S. Financing is not available if the vessels would be engaged in solely foreign-to-foreign trade, e.g. between Japan and Indonesia, although Title XI financing would be available. Further, these defendants knew that it is illegal for a non-American citizen either directly or indirectly to control or to have a majority ownership interest in a corporation owning an American-flag vessel, bareboat chartering an American-flag vessel or holding a contract for the construction of a vessel being built in an American shipyard and for United States registry.

(b) A United States citizen is defined under Section 2 of the Shipping Act, 1916, as amended (46 U.S.C. §802) as follows:

> "(a) Within the meaning of this chapter no corporation, partnership or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and in the case of a corporation, unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens and the corporation itself is



> organized under the laws of the United States or of a State, Territory, District, or possession thereof, but in the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum.
>
> (b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or, (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.
>
> (c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to 75 per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if 75 per centum of the voting power in such corporation is not vested in citizens of the United States; or (c) if, through any contract or understanding, it is so arranged that more than 25 per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States."

A United States citizen for purposes of the Merchant Marine Act of 1936 is defined to include

"a corporation, partnership, or association only if it is a citizen of the United States within the meaning of Section 802 of this Title, . . ." (46 U.S.C. §1244)

24. (a) Burmah and Kulukundis thereupon entered upon a plan and conspiracy with certain of the defendants, aided and abetted by other of the defendants, as more particularly hereinafter set forth, to deliberately defraud the United States in connection with applications for C.D.S. Financing and Title XI Financing for construction of vessels to transport L.N.G. by, among other things, causing the applicants for said financing to falsely be given the appearance of United States citizens, when in truth, in fact, the applications were for the benefit of BOCL, its subsidiaries, and affiliates which were the real parties in interest.

(b) Burmah in actuality dictated the terms of the transactions hereinafter described, arranged the financing, and underwrote and guaranteed the costs in connection with substantially all the transactions herein alleged.

25. (a) Pursuant to the foregoing plan and conspiracy, Burmah, Kulukundis, Chen, Cuneo and certain of the other individual defendants in 1972 caused the Cryogenic Companies and the Summit Companies to be organized and in 1973 caused the Cherokee Companies to be organized.

(b) All costs and expenses of the Cryogenic Companies, the Summit Companies and the Cherokee Companies, including officers' salaries and legal fees, among other expenses, have been borne by Burmah either directly or indirectly. In certain circumstances, the expenses have taken the form of charges to the capital costs of the vessels which Burmah ordered to be billed and for which Burmah ultimately pays.



(c) The Cryogenic Companies and the Cherokee Companies were formed and organized for the express purpose of

(i) making application to the Maritime Administration of the United States ("MarAd") for C.D.S. Financing and Title XI Financing, and

(ii) entering into shipbuilding construction contracts with the Quincy, Massachusetts shipbuilding division of General Dynamics, all for the benefit of and subject to the control of Burmah.

26. (a) Burmah in September 1972 and in October 1975, respectively caused the Cryogenic Companies first, and then the Cherokee Companies to enter into contracts with General Dynamics for the construction of vessels at Quincy, Massachusetts to transport L.N.G.

(b) Each of the Cryogenic Companies contracted for the construction of one 125,000 cubic meter capacity L.N.G. vessel for a total contract price, including C.D.S. Financing of $89,575,000 each, or $268,725,000 in the aggregate.

(c) Each of the Cherokee Companies contracted for the construction of a L.N.G. vessel at a fixed price ranging from $94 million for each of the Cherokee I through III Companies' vessels; $93.6 million for the Cherokee V Company's vessel; and $98 million for the Cherokee IV Company's vessel. Performance by these Cherokee Companies under the Construction Agreement was guaranteed by Burmah to the extent of at least $62.5 million.

(d) The aforesaid contracts involved construction of at least eight 125,000 cubic meter tankers to carry L.N.G. and these contracts aggregate approximately $750 million.

(e) Construction work on each of the tankers is at various stages. One ship was launched in December 1975 and General Dynamics has publicly reported that work on the additional ships "is proceeding satisfactorily." Keels have been laid for all of the eight vessels. As of July 31, 1975, the percentage of contract work completed on each of the first five vessels were as follows:

| | |
|---|---|
| Cherokee I | 29.63% |
| Cherokee II | 13.12% |
| Cherokee III | 1.77% |
| Cherokee IV | .87% |
| Cherokee V | 6.36% |

In the one year since July 31, 1975 which has passed, each of the contracts for the eight vessels has progressed substantially.

(f) In its financial statements for the year ended December 31, 1975, General Dynamics reported that costs incurred in the foregoing construction programs to December 31, 1974 and December 31, 1975 amounted to $109 million and $260 million, respectively, less progress payments received from Burmah or on their behalf of approximately $95 million and $239 million, respectively. A substantial portion of these payments was subsidized and/or guaranteed by the United States of America under C.D.S. Financing or Title XI Financing.

(g) Under the provisions of the construction contracts, title to the vessels while under construction remains with General Dynamics until delivery, at which time it passes to the purchasers under the contracts, i.e. Cherokee Companies and the Cryogenic Companies or their respective assigns. The beneficial owners are Burmah.



27. (a) In August 1973, the Cherokee Companies, except Cherokee V Shipping Corporation, made applications to MarAd for C.D.S. Financing and Title XI Financing. Amended applications were filed in October 1973. In February 1974 Cherokee V Shipping Corporation filed with MarAd an application for C.D.S. Financing and Title XI Financing.

(b) In connection with the applications on behalf of the Cherokee Companies, except Cherokee V Shipping Corporation, Bullitt represented to MarAd that he was the legal and beneficial owner of all of the common stock of each of the applicant corporations and he executed and caused to be delivered affidavits of United States corporate citizenship.

(c) In fact, in so doing he was acting on behalf of Burmah and at the instructions of Burmah and Kulukundis.

(d) The application and affidavits for the Cherokee Companies were false and fraudulent.

(e) The nominal owners of the Cherokee Companies have never made a real or tangible investment in those companies or in any of the ship construction projects or the financing thereof which are the subject of this action.

28. The Cherokee Companies are not citizens of the United States within the meaning of the Shipping Act, 1916 and the Merchant Marine Act of 1936 and they do not qualify for C.D.S. Financing or Title XI Financing.

29. (a) In July 1972 the Cryogenic Companies made applications to MarAd for C.D.S. Financing and Title XI Financing.

(b) In connection with the applications on behalf of the Cryogenic Companies, Durbin, or others presently unknown,

acting under his direction and under the direction of Burmah and Kulukundis, represented that he was the legal and beneficial owner of all the common stock of each of the applicant corporations and he or persons acting pursuant to his instructions executed and caused to be delivered affidavits of United States corporate citizenship.

(c) In fact, in so doing he was acting on behalf of Burmah and at the instructions of Burmah and Kulukundis.

(d) The application and affidavits for the Cryogenic Companies were false and fraudulent.

(e) The nominal owners of the Cryogenic Companies have never made a real or tangible investment in those companies or in any of the ship construction projects or the financing thereof which are the subject of this action.

30. The Cryogenic Companies are not citizens of the United States within the meaning of the Shipping Act, 1916 and the Merchant Marine Act of 1936 and they do not qualify for C.D.C. Financing or Title XI Financing.

31. Pursuant to the aforesaid plan and conspiracy and in an effort to give the transaction a semblance of legality, Burmah and Kulukundis directed Durbin to transfer all of the stock of the Cryogenic Companies to the Wilmington Trust Company of Wilmington, Delaware ("Wilmington Trust", sometimes hereinafter referred to as Owner-Trustee) and then to execute and implement the following financing plan:

(a) with the understanding that the Cryogenic Companies' vessels would be used for the Easco Transportation Agreement, the Cryogenic Companies' Title XI applications had set forth a form of financing known as Leverage Lease Financing. Under



this type of financing plan, the construction contracts between the Cryogenic Companies and General Dynamics were to be assigned and, in fact, were assigned to a United States citizen owner-trustee who would purport to hold legal title to the construction contracts during the period of construction, and thereafter to hold legal title to the vessels upon delivery, allegedly for the benefit of institutional investors ("the alleged equity-participants"), but in reality for the benefit of Burmah.

(b) The Owner-Trustee would agree, and in fact did agree, to borrow funds sufficient to construct the vessels and pay all interest and other costs related to the construction of the vessels which indebtedness would be evidenced and is in fact evidenced by short term promissory notes maturing upon the date of delivery of the constructed vessels.

(c) The promissory notes were guaranteed by the United States of America pursuant to Title XI Financing, to the extent of 75% of the statutorily defined "actual cost of construction of the vessels." The balance of the notes (securing the excess over and above the 75%) were guaranteed by BOCL and Burmah Oil.

(d) Upon delivery of the vessels, it is intended that the purported United States citizen, who would be then acting as Owner-Trustee of the vessels, would satisfy the short term notes by virtue of the proceeds from the sale of long term ship mortgage bonds guaranteed by the United States under Title XI Financing to the extent of 75% of the statutorily defined "actual cost", with the balance in excess thereof to be satisfied from equity contributions of the alleged equity-participants.

(e) Because the Owner-Trustee is a lending institution

and has no ship operating capabilities, the Owner-Trustee has agreed to lease the vessels (commencing with their delivery from General Dynamics) under long term "bareboat" charters, to United States citizen purported operating companies, namely the Summit Companies which companies, in turn, have agreed to sublease the vessels to Burmah or its subsidiaries under the long term charter arrangements with the Marine Companies. The purported operating companies are not bona fide operating companies but ones organized solely for purposes of this financing plan, to benefit Burmah.

(f) The time charter payments by Burmah are to be fixed at a rate sufficient to cover

(i) all costs and expenses of the United States citizen purported operating company plus a profit for that purported operating company;

(ii) payment of principal and interest on the Title XI guaranteed ship mortgage bonds; and

(iii) an amount to provide a return on and recovery of the alleged equity-participant's investment.

32. The foregoing financing plan, as alleged at paragraphs 31(a) to (f) is a deliberate fiction and subterfuge to avoid the intent and provisions of the Merchant Marine Act of 1936, namely that the funds of the United States Government under C.D.S. Financing and Title XI Financing be used for the benefit of only truly United States citizens, and not foreign citizens such as BOCL, the real party in interest. The Owner-Trustee, FNCB, General American and the alleged other equity-participants and lenders are only acting as lenders and financing vehicles and not as bona fide equity owners; the interpositioning



of alleged United States citizen operating companies, as aforesaid, is a deliberate artifice and subterfuge.

33. (a) In August 1974 documents establishing the legal commitments of all parties to the plan of financing, as described in paragraphs 31(a) through (f) and 32 were executed by Wilmington Trust, FNCB, General American, the Summitt Companies, the Marine Companies, Burmah Tankers, BOCL and others; the construction contracts with General Dynamics were assigned by the Cryogenic Companies to the Wilmington Trust and to FNCB, to General American and to the First National Bank of Chicago (not a named defendant but a co-conspirator), acting directly or through wholly owned subsidiaries, some of which are named defendants and some of which are the alleged equity-participants. In reality, the Wilmington Trust with the equity participants were in fact only lenders and financing vehicles as alleged in paragraphs 31 and 32.

(b) Burmah, Kulukundis, Chen, Cuneo, Shelby and Energy agreed that Energy through its subsidiaries the Summitt Companies would be the alleged United States operating companies which would charter the vessels to Burmah and the Marine Companies in accordance with the proposed plan and conspiracy as hereinbefore alleged.

(c) In order to further implement the foregoing, Burmah Kulukundis, Chen, Cuneo and Shelby caused the Cryogenic Companies to assign the construction contracts with General Dynamics to Energy and General Dynamics agreed to the foregoing.

34. The Easco Transportation Agreement and the construction contracts between the Cryogenic Companies and General

Dynamics and the aforesaid financing plan were made possible only as a result of BOCL's agreeing to guarantee all of the aforesaid construction financing and chartering arrangements.

35. (a) The financing arrangements originally contemplated for the vessels in connection with the Pertamina Transportation Agreement were to parallel those contemplated for the vessels in connection with the Easco Transportation Agreement, as aforesaid. Construction contracts and Title XI applications were to be assigned by the Cherokee Companies to an owner-trustee for three institutional lenders, who would supply a portion of the capitalized costs of the vessels at delivery; the substantial balance thereof to be provided by the sale of Title XI guaranteed bonds issued in the name of the owner-trustee. During the course of construction, the vessels were to be financed by Title XI guaranteed notes issued in the name of the owner-trustee and the balance by BOCL and Burmah Oil.

(b) Preliminary commitments by the United States of America to guarantee obligations in connection with Title XI Financing were received for the first four vessels on November 7, 1973 and for the fifth vessel on May 21, 1974, based upon the applications as alleged at paragraph 27 hereof.

(c) Pending the receipt of financing commitments from the institutional lenders, BOCL and Burmah Oil obtained a temporary interim construction loan for the benefit of the Cherokee Companies, which monies were paid to General Dynamics as progress payments in connection with the construction contracts for the vessels.

(d) The financing commitments from institutional lenders were not forthcoming by late 1975, and BOCL and Burmah



Oil have since January of 1975 loaned more than $105 million to the Cherokee Companies for purposes of repayments of temporary interim loans and for monthly progress payments to General Dynamics, as well as for other expenses related to the construction of the vessels.

(e) The foregoing loans by BOCL and Burmah Oil to the Cherokee Companies are evidenced by unsecured promissory notes of the Cherokee Companies containing certain affirmative covenants and negative covenants. Under the affirmative covenants, the Cherokee Companies, among other things, agree to provide financial information to BOCL and Burmah Oil; pay all taxes, assessments and other government levies, all lawful claims and trade bills, etc. so that the assets of the companies are not impaired; maintain books and records and allow BOCL and Burmah Oil reasonable inspection thereof; perform all obligations under the construction contracts; maintain their corporate existence; and use the proceeds of the loans only for the construction and financing of the vessels and expenses related thereto.

Under the negative covenants, among other things, the Cherokee Companies agree not to, without the consent of BOCL and Burmah Oil, incur any indebtedness other than (i) notes payable to BOCL and Burmah Oil or (ii) indebtedness guaranteed by the U. S. Government to finance the construction of the ship; create or suffer to exist any liens or encumbrances on their assets [subject to limited exceptions not here relevant]; give any guarantees with respect to obligations of others; make any loans or advances; make any investments or allow new contributions to their own capital; enter into any consolidation, merger or sale of assets; declare dividends or otherwise dis-

tribute assets; or enter into any business other than that related to the construction, financing and chartering of the vessels.

36. In connection with the construction of the vessels for the Easco Transportation Agreement, the United States of America has been caused to pay out in excess of $60 million and guarantee construction loans for the construction of those vessels, and in connection with the vessels being constructed for the purposes of the Pertamina Transportation Agreement, the United States of America is about to be caused to make additional commitments of guarantee and to pay out monies for the construction of those vessels.

37. All of the defendants have benefitted from the conspiracy of Burmah and Kulukundis to obtain for Burmah United States Government financing as aforesaid, well knowing that under the law Burmah and particularly BOCL, as a foreign citizen, is not entitled. General Dynamics has proceeded with the construction contracts knowing substantially all of the facts as alleged herein. FNCB, GATX Corp., General American and GATX Leasing with knowledge of the facts alleged herein have made substantial monies from the financing. Kulukundis, Chen, Cuneo and Shelby, by interpositioning Energy as the purported operating company who will charter vessels to Burmah upon their completion and delivery, have benefitted and will continue to benefit from the profits to be made from the charter arrangements as well as by other secret agreements among themselves.

38. The MarAd Administration, or at least some of its personnel, have closed their eyes to the realities of the arrangements and have permitted the defendants to proceed as alleged herein, and they have in the past permitted other foreign citizens to wrongfully benefit from C.D.S. Financing and Title XI Financing, directly or indirectly.



39. (a) In an effort to cure the illegalities that exist in the financing arrangements as heretofore alleged at paragraphs 31, 32, 33 and 35(a) and (b), BOCL, Burmah Oil, BGT, General Dynamics, the Cherokee Companies, Energy, Kulukundis, Chen, Cuneo and Shelby under date of August 27, 1976 have proposed to MarAd a new means of financing the vessels under construction to be used for purposes of the Peteramina Transportation Agreement and have requested a modification of the preliminary commitments for Title XI Financing issued by the United States of America as more particularly alleged at paragraph 35(b) hereof. That proposal submitted over the signature of Shelby, as Vice President of each of the Cherokee Companies and joined in by General Dynamics, is annexed hereto as Exhibit A.

(b) The aforesaid application is as much a subterfuge as the prior financing vehicles in view of the fact that the ultimate beneficial users of the vessels and real parties in interest are BOCL, its subsidiaries and affiliates, most of whom are foreign citizens, and furthermore, all of the essential facts have not been disclosed in said application.

**The Illegality and the Violations Under the False Claims Act**

40. (a) The Shipping Act of 1916, as amended, and particularly Sections 2, 9 and 37 thereof, provide, in effect, that it shall be illegal for a non-American citizen, e.g. a foreign individual or foreign corporation, either directly or indirectly

(1) to control, or

(2) to have a majority ownership interest in a corporation

(i) owning an American flag vessel, or

(ii) bareboat chartering an American flag vessel, or

(iii) holding a contract for the construction of a vessel being built in a shipyard in the United States and for United States registry.

(b) The Merchant Marine Act of 1936 makes it illegal for the United States of America to grant C.D.C. Financing or Title XI Financing to or for the benefit of a non-United States citizen, but, specifically Title XI guarantees may be applied for only by citizens of the United States (46 U.S.C. §1272(a); Title XI guarantees may be issued only for obligations to aid in construction of vessels owned by citizens of the United States (46 U.S.C. §1274).

(c) All of the commitments from MarAd, the subsidies, the guarantees and payments, as alleged in this complaint, were for the benefit of foreign citizens and particularly BOCL, the real party in interest in all of the aforesaid transactions, and accordingly are illegal.

41. (a) The defendants and each of them named herein at relevant times, as alleged herein, have deliberately made or caused to be made, presented or caused to be presented, or aided and abetted therein, for approval and payment by MarAd and the United States of America, claims for C.D.S. Financing and/or Title XI Financing, knowing such claims to be false or fraudulent, and each knowing that he or it would directly or indirectly benefit thereby.

(b) FNCB and General American would not have participated in the financing of the construction of the vessels but for the Title XI Financing including the guarantees and commitments for guarantees from the United States of America. Each of them knew that the real parties in interest were Burmah (including BOCL) and their subsidiaries and affiliates, and accordingly they have further aided and abetted the violations herein complained of.



42. These defendants for the purpose of obtaining or aiding to obtain written commitments for C.D.S. Financing and/or Title XI Financing in connection with the construction of L.N.G. vessels by General Dynamics at Quincy, Massachusetts for the benefit of Burmah, as well as their own respective, individual and corporate benefits, deliberately made, used or caused to be made, or used false applications, accounts, claims, certificates, affidavits and other documents, knowing the same to contain false and fraudulent statements and knowing same to be part of an artifice, plan, conspiracy and scheme to defraud the United States of America.

43. These defendants, as aforesaid, to benefit themselves, entered into agreements, combinations and conspiracies to defraud the Government of the United States and MarAd, its officers and employees in connection with C.D.S. Financing and Title XI Financing.

44. All of the foregoing was done deliberately with the intent to obtain financing from the United States of America which would ultimately benefit these defendants directly and indirectly, and which these defendants knew could not be obtained if all the true facts had been disclosed.

45. There has not been a full disclosure to the United States

of America, including the Department of Justice, or to MarAd, of all of the essential facts relating to the foregoing.

46. Burmah, Burmast, the Marine Companies, Energy, the Summitt Companies and the Cherokee Companies, Cryogenic Companies and the individual defendants named herein are financially unable to respond to the United States of America in the double damages to which it is entitled pursuant to Section 231 of the False Claims Act, by reason of the conduct complained of herein.

47. The plaintiff for herself as well as for the United States has no adequate remedy at law.

WHEREFORE, plaintiff on behalf of the United States of America and for herself, prays for judgment against the defendants and relief as follows:

1. that, pursuant to Section 231 of Title 31 of the United States Code, each of the defendants forfeit to the United States of America the sum of $2,000 and in addition double the amount of damages which the United States of America has sustained by reason of the acts complained of in this complaint;

2. that each of the defendants account to the United States of America for their participation in the transactions complained of by this complaint;

3. declaring that each of the applications of the Cryogenic Companies and the Cherokee Companies and all amendments thereto to the Maritime Administration for either C.D.S. Financing and/or Title XI Financing, heretofore filed with the Maritime Administration, are void and illegal and enjoining the defendants permanently from obtaining, directly or indirectly,



any monies from the United States of America in connection with the construction of vessels by General Dynamics for the ultimate benefit of the Burmah Oil Company Limited, any of its subsidiaries or affiliates, or any of the other Burmah defendants named herein;

4. that there be declared forfeit to the United States of America the eight vessels presently being constructed by General Dynamics for Burmah.

5. that there be awarded to the plaintiff Dorothy S. Greenberg, out of the proceeds received as a result of this action or of any settlement of the claims involved herein

(i) if the action shall be carried on by the United States as provided within Section 232 of Article 31 of the United States Code, an amount which in the judgment of the Court is fair and reasonable compensation to the plaintiff for disclosure of the information or evidence not in the possession of the United States when this suit was filed, such award in no event to exceed one-tenth of the proceeds received as a result of this action or any settlement thereof;

(ii) in the event this action is not carried on by the United States but is prosecuted by the plaintiff to final judgment or to settlement, an award to the plaintiff out of the proceeds thereof, which in the judgment of the Court is fair and reasonable compensation, such award in no event to exceed one-fourth of the proceeds thereof.

6. An award to the United States for its costs; or if the action is prosecuted by the plaintiff, an award to the plaintiff of her costs, disbursements and expenses incurred in the prosecu-

tion of this action, including reasonable attorneys' fees and accountants' fees.

LIPPER, LOWEY & DANNENBERG and
BURTON L. KNAPP

By: RICHARD B. DANNENBERG
A Member of the Firm

Attorneys for Plaintiff
747 Third Avenue
New York, New York 10017
(212) 759-1504

Of Counsel:
Frank G. Newman, Esq.
Newman, Shook & Newman



STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

DOROTHY S. GREENBERG, being duly sworn, deposes and says that she is the individual plaintiff herein named who brings this action on behalf of the United States of America; that she has caused the foregoing Complaint to be prepared, has read the foregoing and knows the contents thereof; that the statements contained therein are true except as to those matters alleged upon information and belief and as to them she believes them to be true.

The sources of her information are various documents in her and her attorneys' possession including memorandum from files of Burmah Oil Company Limited; memorandum from Richard W. Kurrus to John J. McMullen, confidential memorandum from Richard W. Kurrus to John J. McMullen, memorandum of law by law firm of Kurrus and Jacobi; complaint for action in Supreme Court of the State of New York; a folder entitled "News Releases" containing a compilation thereof dealing with the subject matter of this action, and memorandum of law to Dr. John J. McMullen from Seymour & Patten re New York Law Of Directors' Self-Dealing (L. Padron and ONG matters).

DOROTHY S. GREENBERG

Sworn to before me this
29th day of September, 1976

HARRY R. CHARAL
Commissioner of Deeds
City of New York 2-153
Certificate Filed in New York County
Commission Expires June 1, 1977

**SCHEDULE A TO COMPLAINT — STATEMENT OF DISCLOSURES ON BEHALF OF DOROTHY S. GREENBERG PURSUANT TO SECTION 232(C) OF TITLE 31 OF THE UNITED STATES CODE**

**STATEMENT OF DISCLOSURES ON BEHALF OF DOROTHY S. GREENBERG PURSUANT TO SECTION 232(C) OF TITLE 31 OF THE UNITED STATES CODE**

TO: The Attorney General of the United States
Washington, D. C.

DOROTHY S. GREENBERG, residing at 240 West 75th Street, New York, New York, hereby discloses and presents to the Attorney General of the United States, the following:

1. An undated Memorandum consisting of 17 pages which is an internal Memorandum from the files of Burmah Oil Company Limited.

2. A Memorandum dated May 12, 1975 from Richard W. Kurrus to John J. McMullen consisting of three pages, the subject of which is:

> "Meeting ON Thursday Morning, May 8, 1975, with Robert J. Blackwell, Maritime Administrator, Assistant Secretary of Commerce for Maritime Affairs, and Samuel Nemirow, Assistant General Counsel, Maritime Administration, and Stanley J. Wilson, General Manager, Burmah Oil Ltd., and Richard W. Kurrus"

3. A confidential Memorandum dated August 21, 1975 from Richard W. Kurrus to John J. McMullen consisting of five pages.

4. Memorandum of Law for Burmah Oil Tankers Limited dated September 16, 1975 by the law firm of Kurrus and Jacobi,



Washington, D. C. consisting of sixty-three pages and an Appendix (consisting of a Letter Agreement under date of November 7, 1973 executed December 12, 1973 and form of promissory note — six pages).

5(a) A Complaint for an action in the Supreme Court of the State of New York against Elias J. Kulukundis, et al.

5(b) A Complaint for an action in the Supreme Court of the State of New York, County of New York entitled

> "THE BURMAH OIL COMPANY LIMITED and BURMAH OIL INCORPORATED,
>
> Plaintiffs,
>
> — against —
>
> ENERGY TRANSPORTATION CORPORATION, C. Y. CHEN, JOSEPH J. CUNEO, JEROME SHELBY, CHEROKEE I SHIPPING CORPORATION, CHEROKEE II SHIPPING CORPORATION, CHEROKEE III SHIPPING CORPORATION, CHEROKEE IV SHIPPING CORPORATION and CHEROKEE V SHIPPING CORPORATION,
>
> Defendants."

6. A folder entitled "News Releases" containing a compilation thereof which dealt with the subject matter of the action, consisting of some sixty-six pages.

7. A Memorandum of Law to Dr. John J. McMullen from Seymour & Patten re New York Law of Directors' Self-Dealing (L. Padron and ONG Matters).

8(a) A Memorandum dated July 28, 1975 re interview with Elias J. Kulukundis.

8(b) A Memorandum dated November 14, 1975 entitled Interview with N.J.D. Williams.

DOROTHY S. GREENBERG

Dated: September 29, 1976



[ITEM 1 HAS BEEN OMITTED]

**ITEM 2 OF SCHEDULE A TO COMPLAINT — MEMORANDUM DATED MAY 12, 1975 FROM RICHARD W. KURRUS TO JOHN J. McMULLEN**

MEMORANDUM

To: Dr. John J. McMullen May 12, 1975

From: Richard W. Kurrus

Subject: Meeting on Thursday Morning, May 8, 1975, with Robert J. Blackwell, Maritime Administrator, Assistant Secretary of Commerce for Maritime Affairs, and Samuel Nemirow, Assistant General Counsel, Maritime Administration, and Stanley J. Wilson, General Manager, Burmah Oil Ltd., and Richard W. Kurrus.

Although this meeting had been provoked by Mr. Blackwell's letter of May 1st to Mr. J. J. Cuneo, a copy of which was sent to Burmah, the letter was not specifically discussed. Neither Mr. Blackwell nor Mr. Nemirow, who wrote the letter, raised that subject. At the outset of the meeting Mr. Wilson explained that Burmah fully intended to complete the construction of at least the 8 LNG vessels, the construction and financing of which it has agreed to guarantee. Mr. Wilson stated the following points:

1. Burmah is a viable enterprise that is capable of carrying through with this project and meeting its commitments;

2. Burmah is seriously concerned with the way that the overall transaction has been structured with many apparently improvident side deals having been entered into which it is

doubtful that any project could carry — no matter how profitable it might be;

3. This overall review of the project has led Burmah to question the participation and function, *inter alia*, of the Energy companies and their subsidiaries;

4. Dr. John McMullen has been placed in charge of this review and Burmah has invested him with the authority to take such actions as may be in the best interests of Burmah; and

5. Even though a problem appears to have developed with the Energy people, Burmah does not wish to abandon the Title XI commitment from Marad and it feels that there is probably no other method of financing that is realistically available for the project.

Mr. Blackwell stated that he appreciated Mr. Wilson's visit and his comments. He observed that the Title XI insurance program has been under some criticism on the foreign control issue and that he hoped the controversy between Burmah and Energy could be settled privately. He wanted to know whether we had met with the Energy people and we stated that they had not responded to Mr. Down's telex to Mr. Cuneo suggesting that they meet with Dr. McMullen. Mr. Blackwell stated that he would be happy to call Mr. Cuneo and urge him to arrange for such a meeting promptly. He also stated that he would call a meeting of the parties in his office but that he felt there should first be an effort by Burmah and Energy to settle their differences privately. Mr. Wilson assured Mr. Blackwell that such an effort would be made.

I met with Mr. Blackwell for lunch on the same day. We had a further discussion of the Burmah-Energy problem. I explained



to Mr. Blackwell that we could understand the function of the Energy companies under the Title XI insurance financing, but that the role of the Energy companies beyond that was impossible for us to understand or justify. Mr. Shelby, as I understand it, came into this deal as a lawyer representing Burmah. He and Messrs. Chen and Cuneo have put together the Energy companies and their subsidiaries in order to meet the legal requirements of United States ownerships and control of (a) the company having the bareboat charter from the owner-lessor, under the leverage lease arrangement and (b) the company holding temporarily the shipbuilding contracts until permanent financing on the Cherokee I–V vessels can be arranged.

People having the substantial interest in a project which Messrs. Shelby, Chen and Cuneo claim usually provide something of substance. Either they have been finders, they have invented something or devised the project, put together the financing under difficult circumstances or brought the indespensible parties to the deal together. Messrs. Shelby, Chen and Cuneo appear to have done none of these things. They rather appear to us to be capitalizing on their special position under the Title XI financing and taking this further to create a vested equity interest in the deal that cannot be justified. I explained to Blackwell that we could not at this time understand the consideration for any commitment to Messrs. Shelby, Chen and Cuneo beyond the Title XI financing arrangements and that the primary purpose of a meeting with them would be to afford them an opportunity to explain what consideration, if any, on their part did exist.

I also explained that we had some serious problems concerning actions that Messrs. Shelby, Cuneo and Chen were taking

that appeared to be in conflict with Burmah's interest. In this respect, I pointed out that they seem to have a continuing business association with Mr. Elias Kulukundis. Furthermore, Messrs. Shelby, Cuneo and Chen are now pursuing, according to our information, their own private LNG project or projects which involve General Dynamics, Pertamina and possibly other companies who are integral and essential parts of the Burmah project. I emphasized that we do not have all of the facts but that if the Energy people are acting in the ways that we have heard, they would be in our opinion violating legal obligations which they owe to Burmah and would be acting improperly and illegally by interfering with Burmah's business relationships to which they have been introduced while they were ostensibly acting on Burmah's behalf.

I also pointed out that this was not a situation where the Energy people had supplied any significant capital investment on their own. All expenses, costs and fees have been paid by Burmah. Under these circumstances, Burmah we feel has a legal right to prevent the Energy people from assuming any larger or different role than their involvement as a conduit in the Title XI financing arrangement contemplated.

Mr. Blackwell stated that he could appreciate this problem but that it was obviously not Marad's problem. He said that he felt that Mr. Kulukundis may have acted imprudently and perhaps even improperly in the deals he set up, but that Burmah had permitted him to operate, had given him a cover of authority and had perhaps even countenanced the deals.

I explained that the real problem *vis a vis* the Energy people arose because of the special legal problems concerning the Title XI financing and that everyone recognized that the structure



that Marad had approved in this deal (and in other similar deals such as Maritime Fruit Carriers, Ultramar, Shell, A. J. Chandris etc.) was based on a fiction. He said that he recognized the weakness in the theory as to how these deals were established and that this is what worried him about a full fledged legal controversy between Burmah and Energy.

I explained that we obviously were not interested in provoking such a legal battle if it could reasonably be avoided, but the way that this deal is presently structured is an unviable and impossible situation for Burmah. If we cave in to the Energy people, we would in a real way be submitting to blackmail. Furthermore, there is a valid argument I believe that the Energy people would be permitted to profit unduly and unconscionably through a United States Government contract.

Mr. Blackwell admitted that there appears to be several things basically wrong with the overall structure of this deal that should be rectified if possible. He agreed that Burmah must take its own actions to place this deal on a sound legal as well as economically feasible basis. I asked him to bear with us in attempting to work out these problems and stated that we would keep him informed of developments.

[Items 2-5 and Portions of 6 Have Been Omitted]

NEW YORK TIMES
AUGUST 19, 1976

# BURMAH OIL'S U.S. AID BID STUDIED FOR POSSIBLE FRAUD

By TERRY ROBARDS

The Securities and Exchange Commission, the Federal Maritime Administration and at least one Congressional committee are investigating whether the Burmah Oil Company, a major British concern, illegally received commitments for Federal guarantees or subsidies to build at least eight huge tanker ships in this country.

Hundreds of millions of dollars in shipbuilding projects and thousands of American shipyard jobs may be in jeopardy because of the possibility of fraud in applying for the Government backing, which is illegal for foreign companies under Federal law.

The ships are under construction at the Quincy, Mass., yards of the General Dynamics Corporation, which received the shipbuilding contracts from Burmah affiliates or subsidiaries. A major portion of the $1.06 billion in these contracts is understood to be in question.

At issue is whether the ships have any right to American subsidies or loan guarantees, since Burmah is not an American company. Federal law specifies that only domestic concerns can receive such Government backing.

Commitments for this backing have been made to a group of companies related to Burmah and set up for the express purpose of trying to fulfill the requirements for American citizenship.

Robert J. Blackwell, Assistant Secretary of Commerce for



Maritime Affairs and head of the Maritime Administration, said in a telephone interview from Washington last night that the agency "has no information to indicate that there was fraud of any type or wrongdoing" in the Burmah applications.

However, Mr. Blackwell also said that some of the original applications filed by the Burmah affiliates had been "more or less aborted" because the companies could not fulfill some of the conditions specified by his agency.

He added that the structure of the corporate entities involved in the shipbuilding contracts was being changed in an effort to assure compliance with Federal law. This was confirmed by an attorney for Burmah, who indicated that General Dynamics would receive an equity interest in the entities.

A memorandum of law prepared by a Washington law firm for a Burmah subsidiary states flatly that the affidavits of corporate citizenship of certain Burmah affiliates that applied for the so-called Title XI guarantees from the Maritime Administration "were fraudulent."

Federal law stipulates that ships built under Federal guarantees or subsidies that were fraudulently obtained are subject to Government seizure. Thus, Burmah could lose a major shipbuilding investment in a blow that would imperil its already troubled financial underpinnings.

Without the loan guarantees, the construction projects would most likely be halted, according to informed sources, because no private financing of the magnitude required could possibly be found in the absence of Government backing.

## $62 Million Loss in 1975

Federal investigators are also looking into allegations of mas-

sive self-dealing by a former officer of a major Burmah subsidiary in this country, Burmah Oil Tankers, which lost nearly $62 million in 1975.

Evidence also exists that payoffs were made by Burmah subsidiaries or affiliates to obtain contracts to ship liquefied natural gas for the Indonesian Government to certain Japanese utility companies. The payoffs were allegedly made to unnamed Indonesian generals or other officials.

The potential impact thus extends all the way to Japan, where certain utility companies agreed to buy Indonesian natural gas to be shipped on some of the Burmah tankers now being built in Massachusetts.

The potential impact on General Dynamics remains uncertain, but any loss of Government guarantees or subsidies by Burmah would raise the possibility of a default on its financial obligations to the American concern.

### A Major Contractor

General Dynamics might then be forced to halt work on the ships. The company is a major defense contractor whose fortunes are closely monitored by the Government. It is building the F-16 fighter for the Air Force and is producing nuclear submarines for the Navy. It also has contingent agreements to produce military aircraft for the countries of the North Atlantic Treaty Organization and for Iran.

A spokesman for General Dynamics, when asked about the situation, said, "We are in contact with Burmah and we know as much as they know. We are totally unaware of anything of that nature involving Title XI insurance."



### Legal Advice Sought

In Washington the S.E.C. is investigating to determine whether American depository receipts for Burmah shares, which trade in the over-the-counter market, should be permitted to continue trading in light of the possibility if inadequate corporate disclosure.

The S.E.C. is also examining trading in General Dynamics shares by officers of the company. In the last eight months four key executives, including the corporation's chairman and the head of the Quincy Shipbuilding Division, have sold some $7.2 million in stock — most of their holdings.

During this period, doubts were mounting over the viability of the contracts with Burmah. And the management of Burmah Oil Tankers was asking for legal advice relating to the Government guarantees and subsidies.

A General Dynamics spokesman said last night: "There is absolutely no substance to any suggestion that any officer of General Dynamics sold stock on the basis of inside information that problems existed in the L.N.G. [liquefied natural gas] tanker program. The company has no indication of any kind that the S.E.C. proposes to investigate such officers stock transactions."

Internal corporate documents from Burmah and confidential memoranda obtained by The New York Times pertaining to Burmah's situation show that serious questions over the legality of the guarantees and subsidies were raised by lawyers 11 months ago.

One memorandum, prepared by the firm of Kurrus & Jacobi, says: "The continued involvement of those companies in the

ship construction contracts will create a cloud on the title of the vessels and could subject them to forfeiture to the United States." Some $476 million is involved in these contracts alone.

The memorandum, dated Sept. 16, 1975, said the financing arrangements "present some extremely perilous legal problems for Burmah." It suggested that "forfeiture of the vessels to the United States would obviously have devastating consequences."

## Court Precedents Cited

The memorandum also suggested that no remedy existed for ships already under construction and backed by Government guarantees and subsidies that had been fraudulently obtained, because court precedents affirm that a ship falls under the jurisdiction of the Shipping Act as soon as its keel is laid or a major hull section is built, if the guarantees were previously applied for.

Other documents obtained by The Times indicate that officials of the Maritime Administration may have been aware that violations of Federal law might have been committed in connection with the Burmah guarantees and subsidies.

In a memorandum to John J. McMullen, former president of Burmah Oil Tankers. Richard Kurrus of the Washington law firm reported that he had engaged in a conversation about Burmah on May 8, 1975, with Mr. Blackwell, the Assistant Secretary of Commerce, and Samuel Nemirow, assistant general counsel of the Maritime Administration.

Mr. Kurrus reported that he met with Mr. Blackwell for lunch later the same day and Mr. Blackwell said he felt that Elias J. Kulkundis, an earlier president of Burmah Oil Tankers, "may



have acted imprudently and perhaps even improperly in the deals he set up."

Mr. Kurrus quoted Mr. Blackwell as saying that he was aware that problems had arisen over the Title XI financing and that "everyone recognized" that the formal arrangement approved by the Maritime Administration "was based on friction."

Asked about this, Mr. Blackwell acknowledged he had met with Mr. Kurrus on May 9, not May 8, 1975, and that they had discussed Burmah's problems. However, he flatly denied that he ever said that the financing arrangements had been "based on fictions."

Mr. Kurrus expressed shock yesterday when informed that a copy of his memorandum had been obtained by The Times. When asked if he wanted it read back to him, he replied, "Don't read it. I don't want to be trapped. That's too dangerous."

Mr. Kulukundis, a Greek with substantial business interests in this country, figures prominently in many of the internal Burmah documents obtained by The Times. He was ousted as the president of Burmah Oil Tankers early in 1975 after the Bank of England rescued the Burmah parent company with $650 million in loan guarantees following the disclosure of massive losses by the American tanker subsidiary.

Several other officers were dismissed, including James Lunden, the chairman, and Nicholas J. D. Williams, the managing director. Alastair Down became the new Burmah chairman, Stanley J. Wilson was made president and Mr. McMullen was named the new president of Burmah Oil Tankers, the troubled subsidiary.

## Lawsuit Never Filed

Ten months later, Mr. McMullen, himself a former official of the Maritime Administration and former chairman and president of United States Lines, was deposed in another Burmah upheaval after he had recommended lawsuits against Mr. Kulukundis and several other individuals allegedly involved in self-dealing.

A confidential memorandum from another Washington Law firm, Seymour & Patton, to Mr. McMullen prior to his dismissal related that Mr. Kulukundis had financial interests in at least two companies that had dealings with Burmah Oil Tankers while Mr. Kulukundis was president of the Burmah concern.

Mr. McMullen asked Seymour & Patton to draw up a lawsuit against Mr. Kulukundis last November. It was never filed and Mr. McMullen was dismissed in December by officers of the parent company in London. Last month he received a $1 million settlement from Burmah after complex negotiations over his sudden termination.

Reached by telephone yesterday at his New York office, Mr. McMullen declined to comment, although he indicated that he felt Burmah was being victimized by forces outside the company. He did not deny the principal details of his financial settlement with the company.

The S.E.C. is looking into the circumstances of Mr. McMullen's dismissal and the subsequent cash settlement to determine what relationship, if any they might have to any potential disclosure of Burmah's internal difficulties.

The commission has asked White & Case, which represented Mr. McMullen in the negotiations, and Simpson, Thacher &



Bartlett, which represented Burmah, for transcripts of the mediation proceedings relating to the $1 million settlement.

## "Difference of Opinion"

The two law firms, both among the most prominent in the country, are understood to have declined within recent days to agree to the S.E.C.'s requests. "We had a difference of opinion and we settled it like gentlemen," Mr. McMullen said yesterday.

The transcript is understood to contain numerous damaging statements concerning Burmah's internal affairs as well as its dealings with individuals outside the company, including the unnamed Indonesian generals.

Another document, a "privileged attorney's work product" from Thomas E. Patton of Seymour & Patton, describes an interview with Mr. Williams, the former Burmah managing director, on Nov. 10 of last year at Broome Manor in the London suburb of Swindon.

The report of the interview, which took place nine months after Mr. Williams was dismissed, says the former Burmah managing director admitted that some Burmah subsidiaries or affiliates had been set up in Indonesia as conduits for payoffs to officials.

## 'Nominee' Concerns Used

The report says Mr. Williams "noted that in that part of the world the only way to do business was to use nominee companies to give people like the generals some money." One of these companies, Astrofina del Mar, Mr. Williams reportedly said, "was simply the nominee whereby Indonesian officials got money."

The memorandum deals extensively with the activities of Mr. Kulukundis when he was president of the tanker subsidiary and mentions that he "had some relations with Pertamina before he joined Burmah." Pertamina is the English word for the Indonesian state oil company.

This is the entity that would be involved in the sale of Indonesian liquefied natural gas to the Japanese utility companies. According to this arrangement, the gas would be carried on some of the ships now being built by General Dynamics at the Quincy shipyards.

Representatives Les Aspen, the Wisconsin Democrat, has raised questions about the Government backing of the shipbuilding contracts both on the basis of "serious questions" regarding the citizenship of the companies and because the ships, once completed, will not be used in any trade with the United States.



**ITEM 7 OF SCHEDULE A TO COMPLAINT — MEMORANDUM OF LAW TO DR. JOHN J. McMULLEN FROM SEYMOUR & PATTEN RE NEW YORK LAW OF DIRECTORS' SELF-DEALING (L. PADRON AND ONG MATTERS)**

SEYMOUR & PATTON
Attorneys at Law
1225 Connecticut Avenue
Washington, D.C. 20036
(202) 452-1711

Memorandum to: Dr. John J. McMullen

From: Seymour & Patton
*New York Law of Directors' Self-Dealing*
(El Padron and ONG matters)

You have requested that we furnish you a legal analysis of a director's liability to his corporation for undisclosed self-dealing; *i.e.*, in transactions of the corporation where a director receives a personal interest or benefit. This analysis is for purposes of further evaluation of the two counts in the proposed complaint against Mr. Kulukundis relating to El Padron, S.A., and Overseas Natural Gas. Kulukundis obtained and continues to have interests in these two companies which were not disclosed to the Burmah or Tankers boards at the time Tankers entered into dealings with them. In particular, you have asked us to advise you whether Mr. Kulukundis' undisclosed interests in El Padron, S.A., in the form of his directorship and receipt

of money, is in violation of the law in circumstances where Tankers benefitted financially from its charter with El Padron. In other words, may a director benefit personally on the other side of a transaction if his corporation also benefits?

*Conclusions:*

1. Tankers' transaction with El Padron is probably voidable as unfair to Tankers, but even if it were determined to be fair to Tankers or if Tankers should elect not to have it set aside, Kulukundis is liable to Tankers for the money he received from El Padron in breach of his fiduciary duty.

2. The issuance of Burmast East shares to ONG is a voidable transaction and Kulukundis is also personally liable for breach of his fiduciary duty.

3. Burmah and Tankers have an obligation to demand from Kulukundis a return of the benefits received and to seek recourse if he fails to do so.

*The Relevant Facts:*

*El Padron:* On December 18, 1973, El Padron entered into a time charter with Pertamina whereby El Padron would designate a vessel to perform for three years at $744,410 per month charter hire. On October 28, 1974, Kulukundis became a director, vice president and check signatory of El Padron. On November 18, 1974, Tankers chartered the *Universe Patriot* to El Padron for $474,406 per month, and El Padron simultaneously delivered it to Pertamina to perform under the December 18, 1973 time charter. The charter hire to Tankers from El Padron was $3 per DWT. This was arguably at or near the current market rate, but was only $100 per month more than Tankers was paying to the owner, Sea Tankers. El Padron



receives a monthly differential of $280,000, of which amounts as yet undetermined are received by Kulukundis. El Padron is controlled by Steven Morrelle, Brian Robinson and, it appears, by Kulukundis and his cousin, Michael. The El Padron transaction and Kulukundis' interest therein were never disclosed to or approved by Tankers' or Burmah's board.

*ONG:* On September 23, 1973, Burmast East Shipping Corporation signed the LNG Transportation Agreement with Pertamina. Burmast East at the time had issued 50 of its 1,000 shares to Far East Oil Trading Corp. Burmast East was intended to be a subsidiary of Tankers, and on November 8, 1973, it issued the remaining 950 of its shares to Tankers (843-3/4 shares) and Overseas Natural Gas Corp. (106-1/4 shares). ONG thereby obtained 10.6 percent of a potentially large operation. On November 14, 1973, Burmah's board of directors approved the issuance of the shares to ONG and Tankers. But at that time Kulukundis owned a substantial stock interest in ONG, as established by documents and by his admission. His interest in ONG was not disclosed to the board.

*The Legal Principles:*

Our previous memoranda of June 3 and July 1, 1975 have explained in detail the reasons why New York law governs Kulukundis' fiduciary duties to Tankers and Burmah. These memoranda also discussed in detail the general principles of fiduciary duties of directors and officers. Specifically, however, we shall discuss in this memorandum the law governing the "self-dealing" situation as appears in the El Padron and ONG transactions. In Part III below, these principles are applied to those two transactions.

Under New York law:

1. A contract or transaction involving an interested director is not void or voidable solely by reason of the director's self-interest *if* (1) the facts of his self-interest are fully disclosed to and approved by his corporation's board or the shareholders, or (2) the contract or transaction is fair and reasonable to the corporation. (A third requirement is that the interested director's vote on the transaction not be required for its approval.)

2. Even if a contract or transaction is *not* void or voidable (as a result of full disclosure or fairness to the corporation), a self-dealing director is liable to the corporation if he breaches his fiduciary duty. New York law thus distinguishes between the voidability of the transaction itself and the liability of a director for self-dealing.

The Business Corporation Law (BCL) § 713 governs the validity of an interested director transaction:

§ 713. Interested directors

(a) No contract or other transaction between a corporation and one or more of its directors, or between a corporation and any other corporation, firm, association or other entity in which one or more of its directors are directors or officers, or have a substantial financial interest, shall be either void or voidable for this reason alone or by reason alone that such director or directors are present at the meeting of the board, or of a committee thereof, which approves such contract or transaction, or that his or their votes are counted for such purposes:

(1) If the material facts as to such director's interest in such contract or transaction and as to any such common directorship, officership or financial interest are disclosed in good faith or known to the board or committee, and the board or committee approves such contract or transaction



by a vote sufficient for such purpose without counting the vote of such interested director or, if the votes of the disinterested directors are insufficient to constitute an act of the board as defined in section 708 (Action by the board), by unanimous vote of the disinterested directors; or

(2) If the material facts as to such director's interest in such contract or transaction and as to any such common directorship, officership or financial interest are disclosed in good faith or known to the shareholders entitled to vote thereon, and such contract or transaction is approved by vote of such shareholders.

(b) If such good faith disclosure of the material facts as to the director's interest in the contract or transaction and as to any such common directorship, officership or financial interest is made to the directors or shareholders, or known to the board or committee or shareholders approving such contract or transaction, as provided in paragraph (a), the contract or transaction may not be avoided by the corporation for the reasons set forth in paragraph (a). If there was no such disclosure or knowledge, or if the vote of such interested director was necessary for the approval of such contract or transaction at a meeting of the board or committee at which it was approved, the corporation may avoid the contract of transaction unless the party or parties thereto shall establish affirmatively that the contract or transaction was fair and reasonable as to the corporation at the time it was approved by the board, a committee or the shareholders.

Absent disclosure of a director's interest in a transaction, a corporation may move to set aside the transaction in court, and the other side has the burden of proving that the transaction was fair to the corporation.[1]

Even if B.C.L. § 713 is complied with, however, a director who engages in an impropriety or fraud, or fails to make full

1 This is the relief being sought against Kulukundis and ONG in the proposed third cause of action.

and complete disclosure, is liable to the corporation for breach of fiduciary duty under B.C.L. § 717:

> "A director who does not make a full and fair disclosure of his interest, or members of the board who breach their duty as defined in § 717 in approving such a contract or transaction may be held responsible for such conduct despite a technical compliance with this section." *Legislative Report*, McKinney's Consol. L. of N.Y., Book 6, page 639.
>
> "Nor will members of the board who breach their duty as defined in Section 717 in approving such a contract or transaction be exonerated from liability for their conduct because there has been a technical compliance with Section 713." Hoffman, *Status of Shareholders and Directors Under New York's Business Corporation Law*, 11 Buffalo L. Rev. 496, 566-67 (1962).

Compliance with § 713 will then (in the absence of extraordinary circumstances) preclude the avoidance of a contract with another corporation, although the burden of proving compliance and fairness is on the other party. But even though the contract is not voidable, a director who personally benefits in a transaction is liable for breach of his duty, and directors who know and approve of the self-dealing are also liable. It is well established that a director cannot secure for or reserve to himself any advantage or benefit in acting for the corporation. His gains are unjust enrichments which belong in equity to the corporation, regardless of his intent. *Gildener v. Lynch*, 54 N.Y.S.2d 823 (1945); *Garbarino v. Utica Uniform Co.*, 269 App. Div. 622, 58 N.Y.S.2d 136, *aff'd* 295 N.Y. 794 (1945); *Mann v. Luke*, 44 N.Y.S.2d 202, *aff'd* 272 App. Div. 19 (1943); *Miller v. Crown Perfumery Co.*, 57 Misc. 383, 100 N.Y.S.2d 760 (1908).



Within this legal framework, the El Padron and ONG transactions can be evaluated.

*Legal Remedies Available in El Padron Transaction:*

The operative facts of the El Padron transaction are known and established. There was no board approval of the November 18, 1974 charter party. There was no disclosure to the boards of Tankers and Burmah that Kulukundis was an officer and director of El Padron and that he received money from El Padron. Kulukundis never submitted the El Padron transaction for board approval. These facts standing alone would allow Tankers to move in court for recision of the charter party under B.C.L. § 713. Then, under § 713(b),

> "the corporation may avoid the contract or transaction unless the party or parties thereto shall establish affirmatively that the contract or transaction was fair and reasonable as to the corporation at the time it was approved by the board, a committee or the shareholders."

Fairness is a fact question to be determined under all relevant circumstances. El Padron is merely a conduit for the personal benefit of Kulukundis, Morrelle and others, including possibly other Kulukundis family members. As such, El Padron receives $280,000 per month which might have gone to Tankers. There is an enormous disparity between El Padron's charter hire of $280,000 and Tankers' *de minimus* $100, and El Padron's income is for no purpose other than remunerating certain individuals. In these circumstances, we believe a New York court would be likely to find the deal unfair to Tankers notwithstanding Kulukundis' arguments that the El Padron charter hire allows Tankers to cover its charter payments to Sea Tankers, and that the charter rate to Tankers was at or near the market.

Nevertheless, El Padron's interposition was as a mere conduit for personal gain, and the charter hire could have been much more favorable to Tankers.

Apart from the voidability of the transaction, Kulukundis has personally benefitted from El Padron, and the law of New York is clear. Kulukundis owed undivided loyalty to Tankers, which means that by causing Tankers to contract with El Padron he was obliged to confer benefits only upon Tankers and not himself as well. Even if Tankers received some benefit, it was entitled to the full benefit, including the amounts received by Kulukundis.

The touchstone of the strict New York rule requiring absolutely undivided loyalty was Mr. Justice Cordozo's statement in *Meinhard v. Salmon*, 249 N.Y. 458 (1928):

> "Not honesty alone but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion of particular exceptions.' *Wendt v. Fischer*, 243 N.Y. 439 . . . Only then has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this Court."

For all practical purposes, Tankers is merely breaking even on the *Universe Patriot*, since $100 per month cannot practically be considered a profit. Tankers' benefit is the avoidance of losses. Kulukundis had it in his power, however, to increase Tankers' benefit by refusing to arrogate to himself monies which could and should go to Tankers. This is the rationale of the



*Meinhard* v. *Salmon* doctrine and of subsequent leading New York decisions.

A director owes his company "a loyalty that is undivided and an allegiance that is influenced in action by no consideration other than the welfare of the corporation." *Litwin* v. *Allen*, 25 N.Y.S.2d 667, 677 (1940). Clearly, then, a director may not derive a personal profit which harms his company. *Application of Vogel*, 25 App. Div. 212, 268 N.Y.S.2d 237, 241 (1966); *Pollitz* v. *Wabash R. Co.*, 207 N.Y. 113 (1912).

A showing of "harm" or "detriment" to the company, however, is not the same as a showing that the company did not "benefit," for a transaction beneficial to the company may well nevertheless deprive it of other and greater benefits as a result of the director's self-profiteering.

Controlling New York decisions, therefore, presume that personal profit creates harm to the corporation, in situations like the El Padron transaction. *Foley* v. *D'Agostino*, 21 App. Div. 60, 248 N.Y.S.2d 121, 128 (1964); *Sage v. Culver*, 147 N.Y. 241, 247 (1895); *New York Trust Co. v. American Realty Co.*, 244 N.Y. 209 (1926).

In the recent leading case of *Diamond v. Oreamuno*, 24 N.Y.2d 494, 301 N.Y.S.2d 78 (1969), the Court of Appeals held that a director who used his position to personally profit was liable to the corporation for that profit even though the corporation was not damaged. The question, said the Court, is who is entitled in fairness to the profit, not whether the corporation was "harmed." Moreover, harm is inherent when a director makes a profit as a result of his position.

Liability in the El Padron transaction is even clearer than in

*Diamond*, for Tankers was in fact harmed because it could have received a much better deal except for Mr. Kulukundis' self-aggrandizement.[2] Under the *Diamond* case, the money received by Kulukundis clearly belongs to Tankers.

Finally, it should also be noted that the failure of a director to disclose his self-interest is also in itself an actionable breach of duty not dependent upon a showing of harm, for non-disclosure deprives the corporation of the opportunity to prevent the self-dealing. *New York Trust Co. v. American Realty Co.*, 244 N.Y. 209, 155 N.E. 102 (1926).[3] Here, Kulukundis did not present the facts to the board for its consideration.

*Legal Remedies Available in ONG Transaction:*

The issuance by Burmast East of 10 percent of its common stock to ONG deprives Tankers of equity and profits in the performance of the Transportation Agreement with Pertamina. For this reason, an action to void the issuance of the shares on the ground that Kulukundis' interest in ONG was not disclosed is likely to succeed because the affirmative burden of proving fairness under § 713 could not be met. Absent some evidence not now available, the fact of Kulukundis' interest in ONG was not disclosed to or known by Burmah's board when it approved the

2 Along these same lines, the court in the *Blaustein* case noted that a fiduciary cannot use its dominating and controlling position to make profits which the *cestui* should have made. *See, Blaustein v. Pan American Petroleum & Transport Com.*, 21 N.Y.S.2d. 651, 733 (1940), *modified* 293 App. Div. 97, 31 N.Y.S.2d 934 (1941).

3 The only New York decision which might be construed to require a showing that the transaction itself was unfair to and damaged the corporation — not merely that the further benefits were deprived it — is *Everett v. Phillips*, 288 N.Y .227 (1942), but that case held that mere presence on both boards, *without* personal profit, is not an actionable harm to the corporation unless unfairness is shown. Here, there is the element of personal profit.



stock issue on November 14, 1973. The "Notes for the Board" on that date reveal that ONG is to be issued 10 percent of Burmast East shares, but there is no mention of the ownership, nature or identity of ONG.

Upon these facts the elments of B.C.L. § 713 are not met and the transaction itself is voidable.

In addition, Kulukundis is liable to Tankers for breaching his fiduciary duty. His breach consisted of failing to disclose his interest and also of personally profiting with shares in ONG. Under the settled New York decisions discussed above, Tankers is clearly entitled (1) to rescind the issuance of Burmast East shares in ONG, and (2) to recover from Kulukundis his personal benefit — his stock in ONG and/or all benefits received by him from ONG.

*Recourse Against Mr. Kulukundis:*

We have previously stated in considerable detail the New York law requiring present management to take steps to rectify and recover for improper conduct of a prior officer or director. This obligation applies with respect to the El Padron and ONG transactions. Accordingly, prompt demand should be made upon Mr. Kulukundis and, if necessary, legal action should be instituted against him for the return of monies, stock and other benefits received from these companies.

*Conclusion:*

Counts III and IV of the proposed complaint are meritorious for the foregoing reasons. New York decisional law strongly condems the use of a corporate office for personal profit.

SEYMOUR & PATTON

## ITEM 8(a) OF SCHEDULE A TO COMPLAINT — MEMORANDUM DATED JULY 28, 1975 RE INTERVIEW WITH ELIAS J. KULUKUNDIS

*CONFIDENTIAL*
ATTORNEY'S WORK PROJECT

Memorandum to: The File

From: TEP

Re: Burmah

Date: July 28, 1975

**Interview With Elias Kulukundis**

On Monday, July 19, 1975, Jim Keane (JK), Sam Seymour (SHS) and Tom Patton (TEP) interviewed Elias J. Kulukundis (EJK). The interview lasted from 3:00pm until 4:30pm. Following about two minutes of pleasantries, the discussion began. The following is a chronological record of the interview.

TEP began by stating that certain company transactions could not be explained in the files due to the absence of explanatory files. TEP stated that, as an example, we have recently been discussing with Arnes Naess his claim for a transfer commission for arranging financing for the *Fagerfjell*, which was not documented by any agreement. EJK said he did not recall any transfer commission. He said he thought that any such commission was arranged with the owner (O&U). No arrangement was made by Burmah with Naess.

SHS stated that a letter to EJK from John Davies dated May 13, 1973 stated that commissions of "George" were re-



bated to EJK who paid Davies. EJK said that he thought the interview was to be limited to vessel transactions according to Mr. Wilson's statement to him of last week. EJK said that there were "insinuations" about his conduct. SHS and TEP said that we had several topics to cover which the company needed answers to but agreed to defer the Davies letter to later. TEP said that we would first ask questions about current vessel transactions.

[At this point the Falkefjell suit was discussed as being a pending vessel matter and it was agreed that a discussion of *Falkefjell* would occur on Wednesday, July 30 at 10am, with Hornby, Sutton and Seymour or Patton.]

TEP stated that one current vessel problem was that Tankers has the opportunity to sell the *Vandefjell* but could not do so without knowing the identity of Freeway which has an option to buy one-half the vessel. EJK said he did not know what the *Vardefjell* was, and JK, TEP and SHS said it was the *Burmah Garnet*. EJK said that he did not know why Freeway had a one-half interest. He said that he dealt only with Naess. He knew nothing about Oldgate or Freeway except that they were set up for Norwegian tax purposes.

SHS stated that Ugelstadt of O&U told us that O&U knew nothing about Oldgate and Freeway and that they were set up by Burmah. SHS said that O&U told us that EJK was the one who knew about Oldgate and Freeway and that EJK now says that O&U knows all about them.

EJK replied that this is the first time he ever knew of Freeway. TEP said "Today?" EJK said yes, that he never heard of Freeway before this moment. EJK said that he would give

an affidavit that he never heard of Freeway or Oldgate. SHS and TEP said that Naess refused to tell us about them and that Ugelstadt said that Oldgate and Freeway were set up at Burmah's request. EJK said that Naess set up Freeway and Oldgate for Norwegian tax purposes.*

SHS told EJK that Burmah has a problem continuing to pay Oldgate since Oldgate receives an excess differential over payments to Brandts. EJK said he didn't know about this. He said that Naess, Ugelstadt and Hornby would know. EJK said that he did not know why Oldgate was interposed, but then he made a comment that a bareboat charter required the interposition. EJK said he never dealt with Brandts.

EJK said that the entire *Vardefjell* deal was intiated by O&U through Naess.

SHS asked why *Vardefjell* and *Jonwi* were good deals for Burmah. EJK said that three year charter parties were cancelled and that the cost was spread out. SHS and TEP asked why the deal was good for O&U. EJK said it was good for tax purposes.

TEP asked if Oldgate was created solely for tax purposes, as EJK suggested. EJK said that he did not know. SHS said to EJK that EJK must have an "informed judgment" about the purpose of Oldgate. EJK shrugged.

TEP said that another current vessel problem was Pertamina's default on the *Zodiac* vessels. TEP said that Burmah must finance the mortgages and then look to Carnegie to pay one-half in 90 days. But Burmah's option to get Carnegie's interest on Carnegie's default was pledged to Guiness Mahon, exchanging

*Query: If Ugelstadt did not know why Freeway and Oldgate were created, how could they be for Norwegian tax purposes?



a $250 right for $5,000,000 financing. EJK said he did not recall and to ask Ellis.

SHS asked if EJK had an interest in Carnegie, EJK said "none." EJK said that Carnegie is his relative Michael and Tony. His relatives had a right to an offshore drilling and needed construction financing before placing long term financing. EJK at first said he did not recall the pledge of Carnegie's stock.

SHS asked if Burmah's agreement to pledge the Carnegie shares to Guiness Mahon was a favor to EJK family interests. EJK said "Yes."

SHS: "Where does that leave Burmah?"
EJK: "Ask offshore — Michael and Tony."
JK: "Was there no benefit to Burmah?"
EJK: "None. It was a favor to relatives."
SHS: "There are no records that this was disclosed to the Burmah's boards."
EJK: "I didn't go for approval on this."
SHS: "What was the consideration to Burmah? Was it just for your family?"
EJK: "Definitely. There was no consideration to Burmah. It was just a favor."

SHS asked about the Tankers International commission of 2½%. TEP said the 2½% supposedly on charter hire is being paid as 2½% of charter plus costs. EJK said Burmah can "take control of Carnegie." JK said that we can take control only of operations.

TEP: "Who is Tankers Internation?"
EJK: "You know."

TEP and SHS said we didn't know but we heard that it's Morrelle. EJK said that Tankers International is Morrelle. JK asked Morrelle's nationality. EJK said American, of Russian-Jewish extraction.

EJK said we should talk to Ellis about Zodiac.

TEP then said that Klaveness is another current problem because Klaveness claims repayment of $7 million consisting of $5.5 million plus interest, and we have no records of a loan. EJK said it was not a loan.

SHS: "Were there any real charter parties to cancel?"
EJK: "No. They were created for the deal. It was part of the Profit Improvement Scheme."
SHS: "Whose idea was this?"
EJK: "London."
TEP: "Who is London?"
EJK: "Everybody."
TEP: "Since there were no charter parties, there was no cancellation and no income, and the $5.5 million was to be paid back?"
EJK: "Correct. London said increase profit."
SHS: "Did London know the details of how it was done?"
EJK: "No." EJK said he was given the option to decide how to improve profits. It was to be "audit proof." It was done to allow for auditors' confirmation.
JK: "How widely known was this in London?"
EJK: "Williams' knew. Simone's knew. It was widely known."
SHS: "Did they know that charter parties were created?"
EJK: "Yes."
JK: "What was the purpose?"
EJK: "To get money for 1972 but to spread repayment over 20 years."
TEP: "Who in London suggested the PIS scheme which created Klaveness?"
EJK: "Nicky Williams."
SHS: "Who in Tankers knew about this?"
EJK: "No one."



SHS: "Who helped put the deal together?"
EJK: "Naess."
JK: "Who drew up the document?"
EJK: "Lund"
TEP: "Did Ellis work on this?"
EJK: "Ellis worked on this."
SHS: "Was the $5.5 million booked as a liability?"
EJK: "No. It would not be audit proof if it were a liability."

There was a discussion to the effect that the auditors approved the $5.5 million increase item. EJK said it was set up to get auditors' approval. He again said it was audit proof. The $5.5 million could not be a liability because the auditors would know about it.

SHS asked if there were any other deals like Klaveness and EJK said "no."

TEP and SHS asked why the joint venture in Klaveness and other deals gave up one-half the profits but kept all liabilities.

JK said that a common pattern in transacting was that one-half the profits were given up but not the losses or liabilities.

EJK responded that Burmah had the financing capacity which the banks looked to.

SHS asked: "But why give up one-half the profits?"
EJK: "The ships were under valued."
JK: "But why give up one-half the profits?"
EJK: "The owners had cheap ships. They had cheap contracts. Their contribution was cheap construction contracts."
TEP: "But this does not explain the July 1974 Klaveness joint venture since the ship was not cheap and Burmah gave up one-half."
EJK: "But Burmah had to designate a vessel."

SHS stated that El Padron was a current problem because

El Padron was getting a $280,000 charter hire differential and we didn't know who was receiving the money.

EJK said that "El Padron was an old charter." He said that the Chase bank would not take any more "Pertamina paper" so he gave El Padron a 10-year back to back chater. We said we did not understand this. We asked EJK who was behind El Padron. EJK said his relatives own El Padron. TEP asked which relatives. EJK said Michael Kulukundis. TEP stated that the records show EJK, Robinson and Trinh as directors. SHS asked why EJK was a director.

EJK: "To protect Burmah's interest."
JK: "Who is Astrofina?
EJK: "I don't know."

SHS asked why Robinson was a director and who brought him in. EJK said Michael Kulukundis brought him in. We asked EJK to explain again the chartering arrangement. EJK said that El Padron was an "old company" which had an existing charter out to Pertamina. El Padron went looking for a vessel to fix to the chater. Michael Kulukundis went to EJK. EJK chartered the *Universe Patriot* at above the market since El Padron's charter hire from Pertamina was to be above the then current market.

TEP said that we understand that the 10 year charter from Sea Tankers to El Padron begins after the Burmah-El Padron charter expires. EJK said that never went through.

SHS asked EJK if EJK got "any compensation" from El Padron.

EJK: "Yes."
SHS: "In what form?"
EJK: "Money."
SHS: "I know that, but in what form?"
EJK: "Bonuses."



SHS: "In what amounts?"
EJK: "I will have to check."

TEP then asked why El Padron would take the *Universe Patriot* from Burmah at above the market when El Padron could have gotten another vessel at the time at the lower current market, thus saving charter hire. EJK answered: "We have relations with Pertamina which transcend money."

SHS asked EJK if El Padron had any other dealings with Burmah. EJK said "No." SHS asked EJK "Who is Trinh?" EJK said "....." JK asked if McFarlane got compensation from El Padron. EJK said "No." SHS asked if anyone else at Burmah was compensated by El Padron. EJK said "No." SHS asked EJK from whom his money came in El Padron.

EJK: "Why do you want to know?"

SHS replied that it would help us learn who has El Padron's money. EJK said "I prefer not to answer. I will anwser in time." TEP asked whether EJK's compensation was before or after EJK left Burmah. EJK said "after." SHS said the company would like to learn the source and amount of El Padron's payment to EJK. EJK said he would consider it. SHS then showed EJK the Davies letter concerning commission splitting and asked about the arrangement. EJK said "I prefer not to comment now. I will get in touch."

TEP said that other matters would have to be covered in a later interview, and mentioned the Seabulk arbitration. EJK said he would be glad to explain it and it was agreed that we would talk about Seabulk prior to mid-September when the arbitration is scheduled.

JK then asked questions about Energy. He asked how United

Tankers got in and how Energy got in.

EJK said United Tankers was approached because Burbank was friendly with them. But their price was too high so he decided to form his own company. So Marine Transport and Energy came into the picture. JK reiterated that Energy was created because United Tankers was too expensive.

TEP asked why Chen got 100% of Energy. EJK said he didn't. TEP said he of course meant Chen, Shelby and Cuneo. EJK asid "because they were capitalizing it." JK asked "what capital?" EJK replied: "working capital." JK asked why the 3 men didn't get 51%. EJK said: "Because Marad didn't want Burmah to have any part of it."

JK then discussed Burbank and Dowd. EJK said that Dowd was Burbank's broker who put the deal together and earned 20% of Summit.

[With reference to the Energy discussion TEP's recollection is not acute and JK's memo on this will be more complete.]

JK then asked about Naess' commissions on the Bahamas Terminal. EJK raised Seabulk and said he would be glad to explain it now. He said Dowd started the project and came to EJK with a proposal from Continental Oil. Mosvold was involved in this. This deal did not work so Chen and Dillingham began working with Burmah. Naess brought Hvide and Bergesen to EJK and this was Naess' work which earned him a commission. JK queried the structure of the commission as based on throughput. EJK said it had to be structured some way and the throughput basis meant that commissions would depend on the existence of throughput.



**ITEM 8(b) OF SCHEDULE A TO COMPLAINT — MEMORANDUM DATED NOVEMBER 14, 1975 ENTITLED INTERVIEW WITH N. J. D. WILLIAMS**

PRIVILEDGED ATTORNEYS' WORK PRODUCT

MEMORANDUM

TO: The Files

FROM: TEP

DATE: November 14, 1975

RE: Burmah Oil Tankers, Ltd.

**Interview with N. J. D. Williams**

On Monday, November 10, 1975, David Sutton and TEP interviewed Mr. N. J. D. Williams at Broome Manor in Swindon. The interview lasted from 2:30 to 5:45 p.m. The following is the substance of Mr. Williams' statement to us.

1. *Introduction.*

DS and TEP began by noting the various reasons for this interview. We mentioned the pending litigations in London and New York. The absence of adequate files in Tankers was noted as a particularly big problem in reaching an understanding of Tankers' past transactions. We noted that a number of past transactions were questionable and did not have sufficient documentation. Mr. Williams indicated that he was happy to furnish us with whatever facts he could recall. He said that he had not reviewed any documents or files in preparation for the interview and had not seen pertinent documents in many months. We indicated that his present recollection was important to us

and that the absence of his review of documents would not detract from ????

2. *Reporting and Authority.*

EJK at all times had a defined method of reporting to management but he did not at all times follow it. EJK began his relationship with Burmah when the company was having difficulty getting vessels to service the Chittagong Refinery. Colin Bromige was responsible for the supplies to that refinery. EJK appeared to Bromige and organized a proposed freight contract, and Bromige made a deal with EJK whereby EJK organized transportation to Chittagong. EJK's first contact with Burmah and his first reporting authority was with Bromige and, ultimately, to Tom Simmonds. At that time, Burmah was already contemplating going into the tanker business but EJK independently suggested that the company go into the tanker business and asked for 10% of the equity in the new business. Before Tankers was formed, EJK and Bromige also made an arrangement to get tankers to service the Ellesmere Port. It was in this regard that EJK and Bromige created a plan to take on more tankers than was needed for Burmah's business and to charter out excess tonnage on the spot market so as to average out the losses on the freight paid for the Ellesmere transportation, and indeed even to make a small profit.

As a result of these factors, Tankers was formed in 1970 and an American desk was created in Burmah. Dennis Thatcher headed the American desk and EJK originally reported to Thatcher. Thatcher had great problems with EJK due to EJK's The formal organization and the reporting lines of management inability to communicate and to follow company procedure. were all comprehensively manualized in the PCM manual.



It soon became obvious that Burmah's main growth policy was to increase American profits. This was in 1972. The only way to do this was to establish the American subsidiary, BOI. NJDW expected John Davies to do this job, but Davies was simply not up to it. Davies was out of his depth outside of the legal field. NJDW himself headed up the small legal department of Burmah before he rose quickly to the top and Davis followed him as head of the legal department. Although Davis was at BOI, EJK's reporting function was to Thatcher and not to Davies.

EJK was a poor communicator and never was able to report according to the company's desires. At about the time Davies left, Dewhurst took responsibility for the U. S. desk, and he put Roberts in as head of BOI. For a time, EJK was responsible to report to Roberts. This was a disaster because there were great jealousies and hostilities between the two men. EJK's reporting to Roberts lasted only a short time and the line of reporting was taken from Roberts and given to Swindon where EJK's reporting reference was Dewhurst. This was in about early 1972.

Dewhurst was assigned the role of speaking for Tankers and EJK at board meetings. This role continued to the end of 1974 unchanged. After Dewhurst became the reporting reference, the situation improved. EJK generally kept to this line of reporting to Dewhurst although not exclusively. EJK would report to both NJDW and Dewhurst. The reason the situation was better is that EJK liked the direct line to top management in Swindon. He was impossible with subordinates and equals, but very deferential and solicitous with seniors. The main trouble after Dewhurst became the reporting reference was EJK's role with

the auditors. He constantly complained that the auditors were too restrictive. Tom Mitchell of E&E did a good job of trying to keep EJK in line.

It was always hard for management to understand the details of EJK's proposals. He had an immensely agile mind and always jumped from one subject and one project to the next without buttoning down the details before moving on.

3. *Transactions with Indonesians.*

NJDW recalls generally that EJK had some relations with Pertamina before he joined Burmah and recalls that it involved joint ventures for the Chittagong refinery. He recalls generally that Burmah had a claim against the Kulukundis family joint venture which was resolved by retaining some interest in Pertamina charters.[1] He did not recall the details but believes that this was the first Burmah dealing with the Indonesians.

The next dealing was the formation of Burmast Shipping. NJDW did not know the identity of the others involved in the venture, but believes that they were Indonesians. NJDW mentioned Ibnu as one of the individuals. The charters to Pertamina were profitable and their details were not presented to Swindon. They were regarded as normal charters which did not require approval. With regard to the Indonesian ventures, NJDW noted that in that part of the world, the only way to do business was to use nominee companies to give people like the generals some money. NJDW acknowledge that Burmast Shipping was not a genuine joint venture, but that Astrofina del Mar was simply

1 This relates to the claims of PS&S against C Ventures which was ultimately paid and which resulted in the formation of the two Zodiac joint ventures whose charters were to Pertamina.



the nominee whereby Indonesian officials got money.

Burmast East was the next dealing with the Indonesians. At the time of the creation of Burmast East for the Pertamina LNG transportation agreement, NJDW was wholly submerged in working on the Signal Oil acquisition and he only generally knew what was going on with regard to Burmast East. He recalls that Burmah did require a restructuring of the shares of Burmast East and recalls that EJK himself said that he was unhappy with the number of shares allotted to the Indonesians. DS referred to the board minutes showing the initial intent that Burmah get 57% of Burmast East and the minutes showing Burmah later getting 85%. NJDW did not specifically recall hearing the name Overseas Natural Gas until recently when Mr. Wilson told him about it. But he did understand that this was the Indonesians' company, again mentioning Ibnu.

NJDW did not know of EJK's interest in ONG. If he had known about it, he would not have approved it because "it isn't allowed." (He noted that he was in fact chiefly responsible for EJK not getting a 10% equity interest in Tankers as requested by EJK.) EJK did later raise the question whether he should get a commission for putting the LNG deal togther. NJDW told EJK that they would discuss it if the project went well. Sometime in November-December 1974, he remembers EJK talking casually at dinner about taking care of his son by a trust fund but does not believe that EJK mentioned any particulars. This was not to him a disclosure of EJK's interest in ONG.

DS then recited the history of the opinion letter to Edna as reflected in the files. NJDW believes that Edna was in fact Pertamina, even though it purported to be the Hong Kong broker Robin Lowe. NJDW believes that although the shares in Burmast

East were reshuffled, the same ultimate percentage resulted, *i.e.*, that Tankers got a bigger percentage of Burmast East but a restructured deal so that Edna was still entitled to get shares. DS and TEP noted that no documents presently available to us indicate that Burmah's share in Burmast East was to remain the same overall even though its shareholding was increased.

4. *El Padron.*

NJDW was never aware of the El Padron transaction and in particular he did not know that EJK had an interest in El Padron. If he had known, he would have taken the position that "it could not have been done." This was a charter transaction so it was not expected to be submitted for approval. NJDW stated that he does not know Stephen David Morrelle but thinks he might be a Singapore broker. He did not know that David Morrelle was anything more than a broker for the Indonesians.

NJDW said that he did not know that he was on the boards of Burmast East and Burmast Shipping. If he was put on those boards, it was without his approval. DS and TEP noted that the records show his membership on the boards of these companies.

5. *Profit Improvement Scheme (PIS).*

NJDW believes that EJK probably originated the PIS together with Dennis Thatcher at the time when EJK reported to Thatcher. NJDW understood it to be a device to bring profits forward to present years on the sale of charter parties so as to even out profits over the years. The scheme was said to be achieved by the exchanging, sale or discounting of charters. It was discussed a lot by the board. In March, 1974, EJK was told by the Managing Director's office to do something about profits, *i.e.*, to obtain more out-charters. They also discussed a



Profit Improvement Scheme by bringing forward profits on two particular vessels. NJDW recalls that Simonis said at the end of 1974 htat the *Cedros* Profit Improvement Scheme of EJK's was not in fact a proper increase in profits but at best a loan arrangement. NJDW did not recall the second vessel, but the *Cedros* was the largest. (*See* memorandum of interview of Peter Simonis.) At this point, NJDW noted that the words "audit proof" were sometimes used and that they meant that auditors' approval should be obtained before a transaction was arranged because the accountants were changing and tightening their rules so frequently. The Profit Improvement Scheme had as its basic objective in 1974 the obtaining of cash more so than obtaining profits. Burmah had many large cash commitments and Tankers was not generating any cash at the time.

Tankers could have chartered out its vessels long-term and locked in a better level of income. However, it did not do so because Burmah wanted to keep the vessels free for its own use, *e.g.*, in the Bahamas Terminal and in Burmah refinery trade, rather than committing them long-term for the use of others.

6. *Klaveness.*

The name Klaveness does not ring a bell. DS and TEP explained the facts of the transactions. NJDW recalls the names of the *Jole Fassio* and the *Koll* as engaged on a profitable South African run. He does not equate those vessels with Klaveness. He knew there was a 1972 profit improvement scheme involving a charter but did not know any details.

EJK could not have committed Tankers to making a borrowing without board approval. NJDW does recall that the 1972 discounting of profits scheme involved some Norwegian vessel. He recalls asking EJK why the Norwegians would enter into

such a transaction to pay money to Tankers. EJK replied that it suits Tankers to accelerate income and it suits the Norwegians to reduce income. But NJDW does not recall anything more than a normal transaction to accelerate profits on a charter party. He does not recall any details of the Klaveness joint venture. If he had known of the fictitious charter parties and of the fictitious cancellation agreement, he would not have approved of it because it "couldn't be done."

NJDW was asked why Burmah guaranteed such major commitments as the Klaveness joint venture without scrutiny. At first, he answered that no one would enter into a transaction with a subsidiary but for a parent guarantee. He was then asked why the parent would guarantee such commitments. He said that a guarantee of a debt required approval by the parent board but that a performance guarantee was regarded as only the guarantee of using best efforts to cause performance of a charter and involved only perfunctory approval. This lasted until mid-1974 when the company realized that the guarantee of charter hire which equals a bank financing commitment was the same as a debt guarantee and it was stopped. Until then, there was little control over the guarantee of chatter party performances. It was "just perfunctory." The July, 1974, guarantee of the Klaveness joint venture was viewed as just a replacement of an existing performance guarantee.

NJDW said he assumed that the charter parties were valid because if so there would be nothing wrong with backdating the cancellation to accelerate profits. If the charter parties were not real then of course the transaction would not be allowed.

NJDW did not know that the joint ventures had provisions to get the money back to Klaveness. He heard recently that there



was a "side letter" to that effect and asked us if there was such a side letter. TEP said that there were addenda to the joint ventures relating to the repayment but that the figures were also in the joint venture agreements.

7. *Vardefjell — Jonwi.*

DS explained these transactions. NJDW recalled the name Newgate from somewhere but does not recall any discussion about the undisclosed intermediate companies. His only recollection was that EJK once said in 1974 that the Norwegians were getting nervous about money they had tucked away from tax authorities but this was not related by EJK to the *Vardefjell* or *Jonwi* transactions. NJDW recalls well the name Hocus-Pocus and recalls asking EJK "who the hell they were." When he learned they were Brandts Leasing, he was satisfied. Otherwise, NJDW has no recollection of Oldgate, Newgate, Freeway or Tristar. He stated that there must have been some reason for their interests in the transactions but cannot honestly remember why they were involved. He said that if prompted, he might say that it must have been a Norwegian tax deal but he honestly cannot remember. He only recalls that Newgate rings a slight bell. He suggested that it might be a finders fee. NJDW did not know of Arne Naess' involvement in these transactions. He only knew generally that Naess was one of several brokers for Tankers. (Later he mentioned that he thought Naess was perhaps the true culprit.)

8. *Falkefjell and Fagerfjell.*

NJDW has no recollection at all of these two vessels.

9. *Mosli and Spar.*

He knew that EJK had put some superfinancing money in

an account but did not know why. He doubts that it was for the purposes of the Bahamas Terminal, but probably as a second part of the Saudi payment. EJK told NJDW about it only after it was done and NJDW told EJK to get the money back to Tankers immediately. He assumes that all of the money was returned. As to Spar, the $2.5 million was a scheme by EJK and Brian Thomas to corner Saudi Arabian oil to the U.S. This is why Tankers was used because it was principally a U.S. project. EJK and Thomas put the deal together. Thomas gave NJDW the details of the plan but not the details of the financing through the sale of vessels. He does not know why Battersea got a $2 million transfer commission.

10. *The Carnegie Joint Venture.*

NJDW knew nothing about the details of this joint venture. He only knew generally that it existed. He had no knowledge of the release of shares from escrow to profit EJK's relatives without consideration to Tankers. If he had known, he would not have approved it.

11. *John Davies.*

Davies was not satisfactory as a management person. He was a good lawyer but not a businessman. He was an "inveterate pot-stirrer." He always liked to "twist the knife" at someone else and was something of a trouble maker in the company. There was some talk that Davies and EJK were shareholders together in some Louisiana refinery project. The Davies letter was referred to. NJDW said he would not be surprised if Davies got a commission from EJK but did not know.

12. *Conclusion.*

NJDW's main problem in dealing with EJK was that the



dealings were essentially second-hand by the review of documents already drafted and presented or through reports from Dewhurst. Oral communications from EJK were difficult to understand. NJDW does not believe that EJK has much money and in his opinion, EJK should be sued only if the company is forced to do so to indemnify it against losses. NJDW believes from what he had learned that Naess is the one who benefited the most by Tankers' transactions.

TEP

TEP/ssg

**AFFIDAVIT OF SAMUEL B. NEMIROW, FOR GOVERNMENT, IN SUPPORT OF MOTION**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, by Dorothy S. Greenberg, for herself as well as for the United States of America

Plaintiffs,

— against —

THE BURMAH OIL COMPANY LIMITED, et al,

Defendants.

AFFIDAVIT

76 Civ: 4351 (WK)

District of Columbia
City of Washington
ss

**AFFIDAVIT OF SAMUEL B. NEMIROW**

Samuel B. Nemirow, being duly sworn, hereby deposes and says:

1. I am the General Counsel of the Maritime Administration ("MarAd"), a primary organization within the United States Department of Commerce, and I submit this affidavit in support of the motion of the United States to dismiss this action for lack of jurisdiction.



2. I have read the complaint filed in this action and the documents submitted by the relator to the Department of Justice which are listed in Schedule A to the complaint. The relator has not presented any substantive information not known to MarAd prior to September 30, 1976, when, I am informed, this action was commenced.

3. The sole purpose of this affidavit is to describe generally the information known to MarAd prior to the commencement of this action and not to take any position as to the merits of the allegations contained in the documents submitted by the relator and in the complaint.

4. The documents and the complaint center upon applications for construction-differential subsidy ("CDS") under Title V of the Mercant Marine Act of 1936, as amended (46 U.S.C. §§ 1151-1161) and for guarantees of obligations under Title XI o fthe same act (46 U.S.C. §§ 1271-1280) ("Title XI guarantees").

5. The payment of CDS is intended to encourage the growth and maintenance of both the United States merchant marine and the United States shipbuilding industry. The subsidy payment represents the difference in construction costs between a ship constructed in a foreign shipyard and the same ship constructed in a United States shipyard. The law provides in 46 U.S.C. §§ 1151 that any proposed ship purchaser who is a citizen of the United States or any shipyard of the United States may apply for CDS for vessels to be used in the foreign commerce of the United States. United States citizen is defined in 46 U.S.C. §§ 1244 and in §2 of the Shipping Act of 1916, as amended, 46 U.S.C. §§ 802.

6. Title XI guarantees are full faith and credit guarantees by the United States of debt obligations issued by United States citizen shipowners for the purpose of financing or refinancing United States-flag vessels constructed or reconstructed in United States shipyards. The primary purpose of the program is to promote the growth and modernization of the United States merchant marine and only United States citizens, as defined in 46 U.S.C. §§ 802 and 46 U.S.C. §§ 1244, may apply for such guarantees. Under this program, for example, the United States guarantees prompt payment in full of interest and unpaid principal in the event of default in payment of funds borrowed to finance the construction or reconstruction of a ship.

7. Any vessel constructed with either CDS assistance or Title XI assistance must be registered under the United States flag, be manned by a United States citizen crew, must use United States parts and materials to the greatest extent possible, be built in United States shipyards and be subject to requisition in times of national emergency.

8. The central allegation in the complaint is that there has been a violation of the requirement of United States citizenship for CDS and Title XI guarantees. However, MarAd knew of these allegations prior to commencement of this action and had all of the relevant information that is set forth in the documents listed in Schedule A to the complaint. The information has been in MarAd's possession from four sources: (1) the applications and other documents submitted to MarAd in connection with the processing of the applications for CDS and Title XI guarantees, (2) letters and conversations prior to September 30, 1976, (3) several of the documents listed in Schedule A to the complaint, and (4) media reports.



## The Applications

*Cryogenic Applications*

9. On July 14, 1972, Cryogenic Energy Transporation, Inc., Liquegas Transport Inc. and LNG Transport Inc. (hereinafter collectively referred to as the "Cryogenic Corporations") filed applications for CDS for three LNG tankers to be built by General Dynamics Corporation. A copy of the original applications of the Cryogenic Corporations were amended on August which is virtually identical to the other two Cryogenic Corporations' application, is attached hereto as Exhibit 1. The application of the Cryogenic Corporations were amended on August 31, 1972, September 15, 1972, and September 20, 1972. A representative copy of each amendment, without attachments, is attached hereto as Exhibits 2, 3, and 4 respectively.

10. On August 31, 1972, the Cryogenic Corporations filed applications for Title XI guarantees for obligations to be issued to finance construction of the same three vessels. A copy of the original application, without attachments, of LNG Transport, Inc., is attached hereto as Exhibit 5. The applications of the other two Cryogenic Corporations are virtually identical. The applications were amended on September 15, 1972, and on September 20, 1972. A representative copy of each amendment is attached hereto as Exhibits 6 and 7, respectively.

11. On September 22, 1972, MarAd approved CDS for the three Cryogenic vessels. It also sent a letter to the Cryogenic Corporations, a copy of which is attached hereto as Exhibit 8, conditionally committing MarAd to grant Title XI guarantees in connection with financing the construction costs of the vessels.

The formal commitment to grant Title XI guarantees was given on August 9, 1974.

12. As shown by these documents, as well as by contracts executed on August 9, 1974, the vessels are to be used to transport LNG from Algeria to the United States. The financing arrangement used is referred to as leverage lease financing which is a common form of financing not only for vessels, whether or not constructed with CDS and Title XI guarantees, but also of airplanes, buildings, and other major items. In this type of financing an equity investor or investors normally establish an owner trust which acquires the vessel and then leases it to the lessee. The lease is leveraged in that the owner trustee becomes the owner by providing a percentage of the capital needed to acquire the vessel which capital is received from the equity investors. The balance of the purchase price is borrowed by the owner trustee from institutional investors. In the case of vessels, the owner trustee leases the vessel to a bareboat charterer which is responsible for hiring the officers and crew, operating and maintaining the vessel. The bareboat charterer may in turn charter the vessel to another party under a time charter, pursuant to which the bareboat charterer is responsible for carriage of such cargoes as may be specified by the time charterer for the term of the charter.

13. In this particular case, the owner of the Cryogenic vessels is Wilmington Trust Company as trustee for wholly owned subsidiaries of Citicorp Leasing, Inc., General American Transportation Corporation and First Chicago National Bank. Wilmington Trust Company entered into an agreement on August 9, 1974, to bareboat charter the vessels to Summit I, Inc., Summit II, Inc. and Summit III, Inc., whieh are Delaware



corporations and wholly owned subsidiaries of Summit Marine Operations, Inc., (Summit Marine). Summit Marine is a subsidiary of Energy Transportation Corporation ("Energy"), another Delaware corporation. The owners and principal officers of Energy are C.Y. Chen, with 30 percent of the stock interest, Atwell & Co., nominee of the trustee of a trust for Mr. Chen's two sons, with 50 percent of the stock interest, Joseph Cuneo with 10 percent of the stock interest, Jerome Shelby with 5 percent of the stock interest, and John O'Grady, trustee under a trust for children of Jerome Shelby with 5 percent of the stock interest.

14. The bareboat charterers entered into an agreement on August 9, 1974, to time charter the vessels to Bethel Marine, Southhold Marine and Vermont Marine (the "Marine Corporations"), three Delaware corporations which are wholly owned subsidiaries of subsidiaries of Burmah Oil Company Limited ("Burmah"), a United Kingdom Corporation. The Marine Corporations are incorporated in Delaware and as such are citizens of the United States but since they are subsidiaries of a foreign corporation, they are not United States citizens within the meaning of §§ 2 of the Shipping Act of 1916 (46 U.C.S. §§ 302). However, Section 37 of the Shipping Act, 1916, as amended (46 U.S.C. §§ 835) provides that a vessel may be time chartered to an alien upon approval by MarAd and MarAd gave its initial approval in this case on September 28, 1972.

15. The time charterers have entered into a vessel management contract, dated August 9, 1974, with Burmah Oil Tankers Limited, a Bermuda corporation which is wholly owned by Burmah, pursuant to which the vessels will be made available to fulfill the transportation agreement dated June 26, 1972,

between Burmah Oil Tankers, Ltd. and a joint venture known as "Easco" made up of Public Service Electric & Gas Company of New Jersey and Algonquin Gas Transportation Co., two United States utilities. Easco has a contract with Algeria for the purchase LNG and these vessels will be used to transport the LNG to the United States.

16. Burmah Oil Tankers Limited on August 9, 1974, entered into the BOT Time Charter Guarantee whereby it guarantees to the owner and the bareboat charterer the payment of all time charter hire and other specified sums which are payable by the time charterer to the bareboat charterer.

17. The original applications for CDS and Title XI guarantees indicate that the Cryogenic Corporations and Summit Marine, the originally proposed bareboat charterer, were owned by James H. Durbin. His affiliations with several United States subsidiaries of Burmah were also listed in the original application. However, on or about September 14, 1972, and prior to MarAd approving CDS or Title XI guarantees, Durbin transferred all of his stock in the Cryogenic Corporations to Wilmington Trust and all of his stock in Summit Marine to C. Y. Chen. In or about March 1973 Chen transferred his stock to Energy.

18. The three vessels are presently being constructed by General Dynamics Corporation and are nearing completion. As of the present time the aggregate construction cost paid on the vessels is $280 million of which the United States has paid CDS of approximately $79 million to General Dynamics Corporation for these vessels. The construction costs, less CDS, are being financed by a loan from First National City Bank, 75 percent of which is guaranteed under Title XI and the remainder



by Burmah. Upon completion of the vessels, they will be delivered to the owner which will deliver them to the bareboat charterer. The interim construction financing will be converted into permanent financing by the sale of long term obligations for 75 percent of the actual cost of the vessels, net of CDS. These obligations will carry Title XI guarantees and the proceeds will be used to repay the Title XI guaranteed obligations issued to the First National City Bank.

*Cherokee Applications*

19. On August 8, 1973, four corporations, Cherokee I Shipping, Inc., through Cherokee IV Shipping, Inc., filed applications for Title XI guarantees for four LNG vessels to be built by General Dynamics Corporation. These applications were amended on October 11, 1973. A copy of the application of Cherokee II, as so amended, without attachments but including a copy of the original application, without attachments, is attached hereto as Exhibit 9; the applications of the other Cherokee Corporations are virtually identical. On November 7, 1973, MarAd sent a letter to Cherokee I through Cherokee IV, a copy of which is attached hereto as Exhibit 10, conditionally committing MarAd to issue Title XI guarantees for financing the construction of these four vessels provided that the conditions set forth in the letter were met.

20. On February 12, 1974, Cherokee V applied for Title XI guarantee for another LNG tanker to be built by General Dynamics Corporation. On May 21, 1974, MarAd sent a letter of conditional commitment similar to the one it had sent Cherokee I through Cherokee IV.

21. The applications filed by Cherokee I through Cherkoee

V contemplated leverage lease financing similar to that used for the Cryogenic vessels. The vessels, it was stated in the applications, were to be owned by a trust or corporation established by institutional investors which would bareboat charter the vessels to subsidiaries of Energy. These subsidiaries would in turn time charter the vessels to United States subsidiaries of subsidiaries of Burmah. The time charterers would also enter into a vessel management contract with Burmast East Shipping Corporation ("Burmast"), a Liberian corporation, 57½ per cent of whose stock it was stated was owned by Burmah Oil Tankers. Pursuant to that agreement, the vessels would be made available to fulfill Burmast's transportation agreement with Perusahaan Pertambangan Minjak Dan Gas Bumi Negara, an Indonesian corporation known as "Pertamina". The transportation agreement, dated September 23, 1973, provides that Burmast will transport LNG from Indonesia to Japan.

22. The original applications filed by Cherokee I through Cherokee IV stated that these corporations were owned by John C. Bullit, a partner at the law firm of Shearman & Sterling. The amended applications show that the ownership had thereafter been transferred to Energy.

23. On August 27, 1976, Cherokee I, through Cherokee V joined by General Dynamics Corporation, amended their applications, a copy of which amendment is attached hereto as Exhibit 11. The amendment states, among other things, that General Dynamics Corporation will incorporate five wholly-owned subsidiaries which will become the owners of these vessels by purchasing all of the stock of the Cherokee Corporations. These owners will bareboat charter the vessels to subsidiaries of Energy which will in turn time charter the vessels to subsidiaries of Burmah Oil Shipping, Inc., a Delaware corporation wholly-owned by Burmah. The time charterers will also enter into a vessel management contract with Burmah Gas Transport Limited, a Liberian corporation wholly-owned subsidiary of Burmah, which is the successor by assignment of Burmast.



24. MarAd has not yet acted upon these amended applications for Title XI guarantees. The vessels are presently under construction by General Dynamics Corpoartion pursuant to contracts between it and each of the Cherokee Corporations. As known by MarAd prior to the commencement of this action, Burmah has been making unsecured loans to Cherokee I through Cherokee V, the proceeds of which have been used to make progress payments to General Dynamics Corporation for construction of the vessels.

25. In sum, then, while I have not attempted to state all of the details contained within the documents submitted as part of the Cryogenic and Cherokee applications, or the contracts entered into in connection with the Cryogenic vessels, these documents and contracts do set forth the method by which the vessels are to be financed, the purposes they are to be used for, the intended bareboat and time charterers and the stockholders, directors and officers of all the parties involved.

*Dispute Between Burmah and Energy*

26. As to the allegations contained in the documents submitted by the relator of violations of the citizenship requirement, Burmah itself made this information known to MarAd prior to commencement of this action.

27. In the beginning of 1975, Elias J. Kulukundis, the then President of Burmah Oil Tankers was replaced by John J.

McMullen. During 1975 Burmah and its subsidiaries brought to MarAd's attention allegations that the Cherokee corporations were not United States citizens within the meaning of Section 2 of the Shipping Act 1916, as amended (46 U.S.C.§§802). Burmah made these charges in letters to MarAd and Energy, copies of the ones known to MarAd being attached hereto as Exhibit 12. The letters from Burmah set forth in detail the basis of its charge that each of the Cherokee corporations had an obligation to transfer its stock at the direction of Burmah, including a statement that all costs and expenses of the Cherokee I through Cherokee V projects had been paid by Burmah.

28. On May 1, 1975, Robert J. Blackwell, Assistant Secretary of Commerce for Maritime Affairs, sent a letter to Energy stating that (1) Burmah's allegations raised concern as to whether the citizenship requirement of the statute had been satisfied, (2) Energy should respond in writing to Burmah's charges and (3) a meeting would be held, if necessary, to discuss the matter. A copy of that letter is attached hereto as Exhibit 13.

29. Moreover, representatives of MarAd, including myself, had numerous conversations with John J. McMullen, Richard Kurrus of the law firm of Kurrus & Ash (former known as Kurrus & Jacobi), the attorneys for Burmah Oil Tankers, C.Y. Chen, the persident of Energy and the Cherokee corporations, Jerome Shelby and Joseph Cuneo. These conversations concerned whether the Cherokee and Cryogenic transactions satisfied the citizenship requirement of the statute. During these conversations MarAd was informed in detail of the basic factual allegations underlying the claim that the citizenship requirement had not been satisfied.



30. Thus, based upon these facts, letters and conversations, MarAd was well aware of the information contained in the documents submitted by the relator.

*Relator's Documents*

31. In addition, in or about September 1975, I was shown a copy of the 63 page Memorandum of Law prepared for Burmah Oil Tankers, Ltd., which is item number 4 submitted by the relator in this action. That document concluded that the Cherokee Corporations were not United States citizens based upon the following assertions, among others, made in the Memorandum of Law:

a. The Cherokee Corporations were created and formed at the direction of the former President of Burmah Oil Tanker, Ltd., Elias J. Kulukundis;

b. All of the stock of Cherokee I through Cherokee IV was held by attorneys for Burmah with the clear understanding that they were subject to Burmah's directions and control and that they would transfer such stock to Burmah's designee when instructed to do so;

c. All of the costs connected with the Cherokee Corporations, including all Title XI filing fees, legal expenses and the construction progress payments to General Dynamics Corporation had been borne by Burmah and neither Energy nor its principals had invested any funds in the Cherokee Corporations;

d. The stock of Cherokee I through Cherokee IV was transferred twice to Burmah designees at the direction of Mr. Kulukundis, the first time from John Bullitt of Shearman & Sterling, which represented Burmah, to Eli Ellis, another

lawyer representing Burmah, and the second time from Ellis to Energy, the controlling interest in which is held by C.Y. Chen a long-time business associate of Mr. Kulukundis; and

e. The negative covenants in the promissory notes from the Cherokee Corporations to Burmah in return for money loaned to them by Burmah to pay the General Dynamics Corporation progress payments give Burmah the power to control the Cherokee Corporations. A copy of the form of these notes was also attached to the memorandum.

32. MarAd also received in or about November 1975 a copy of the complaint in the action brough by Burmah and Burmah Oil Tankers against Energy, the Cherokee Corporations, and individual deiendants, which is item 5(b) submitted by the relator. The complaint repeated many of the same factual allegations contained in the Memorandum of Law. It sought, among other things, judgment declaring that Energy, the Cherokee Corporations and the individual defendants should be directed to transfer their stock and the construction contracts between the Cherokee Corporations and General Dynamics Corporation to a named company or a trustee for the ultimate owners of the vessels and that Energy and Cherokee Corporations be required to pay approximately $78 million plus accrued interest on the Cherokee promissory notes due November 17, 1975. The action was discontinued in April 1976 pursuant to a stipulation entered into between the parties dated April 27, 1976.

33. Prior to commencement of this action, MarAd was also aware of virtually all of the American newspaper and magazine articles which are included in item 6 as well as some of the foreign articles which essentially contain the same information



as the American articles submitted by the relator. In addition MarAd knew of other articles which are not listed in item 6, including, for example, the London Times for August 20, 1976.

34. Prior to the commencement of this action MarAd received a copy of a complaint by Burmah Oil Tankers, Limited and the Burmah Oil Company Ltd. v Elias J. Kulukundis, et al, which was to have been filed in the Supreme Court of the State of New York, County of New York, item 5(a) submitted by the relator, which complaint alleges that said Elias J. Kulukundis possessed an interest in Overseas Natural Gas Transportation Corporation which had an interest in Burmast and that said Kulukundis' interest had not been disclosed to Burmah.

35. In addition to the documents described in paragraphs 9 through 34 above, Schedule A to the Complaint lists four other documents items 1, 3, 7, 8 (a) and (b) submitted by the relator to the Department of Justice. MarAd has been given copies of these documents by the Department of Justice and while MarAd had not received them before, they do not contain any significant information not previously known by MarAd either from the documents described above or through being told by representatives of Burmah and Energy.

36. For example, items 7 and 8(a) and (b) of Schedule A to the Complaint, have little relevance to the Cryogenic or Cherokee applications. To the extent they are relevant their main thrust is that Elias J. Kulukundis had an interest in Overseas Natural Gas Transportation Corporation which had an interest in Burmast and that Kulukundis had not disclosed this to Burmah. (Burmast has been replaced by Burmah Gas Transport Ltd., which, according to the August 26, 1976, amendment

to the Cherokee applications, is wholly-owned by Burmah). MarAd had been informed of this in 1975 by representatives of Burmah prior to the filing of this complaint. In fact the same allegations are contained in the complaint against Elias J. Kulukundis described in paragraph 34 above. In addition, item 2 is a memorandum of meetings I and Robert J. Blackwell attended, and which MarAd was thus aware of.

*Other Governmental Inquiries*

37. Finally it should be noted that parts of the Government, other than MarAd, were aware prior to the commercement of this action of the allegations that the citizenship requirement had not been satisfied in either the Cherokee or Cryogenic transactions.

38. In 1974 a private citizen made the charge to Senator Byrd of West Virginia and officials at the White House that the citizenship requirement had been violated in connection with CDS granted on the Cryogenic vessels because the vessels were to be time chartered to corporations which were controlled by Burmah. The White House referred the matter to the Office of Legal Counsel of the Department of Justice for its opinion. A copy of the Department of Justice's opinion, which had been sent to me concurrent with its issuance, is attached hereto as Exhibit 14.

39. By letter dated March 3, 1976, Congressman Les Aspin wrote to Robert J. Blackwell concerning the Cherokee applications. Among other things, Congressman Aspin expressed concern about whether the citizenship requirement was being met since it appeared to him that Burmah and Burmast may be the key parties in that transaction with overall control. By letter



dated April 21, 1976, Mr. Blackwell responded to Congressman Aspin explaining the structure of the Cherokee transactions. By letter dated May 25, 1976, Congressman Aspin wrote to Congressman Jack Brooks, Chairman of the House Committee on Government Operations (the "Committee") referring the matter to the Committee's attention. Copies of these three letters, as they appeared in the Congressional Record on May 25, 1976, are attached hereto as Exhibit 15.

40. In June 1976 the Committee contacted MarAd concerning the issues raised in Congressman Aspin's May 25, 1976, letter. I and other officials of MarAd met with staff members of the Committee on at least 5 occasions since that time and prior to the commencement of this action. During these meetings we explained the structuring of the Cherokee and Cryogenic transactions including the role of Burmah and its subsidiaries.

41. During August 1976 and early September 1976, investigators from the General Accounting Office visited MarAd at the request of the Committee and were given all of MarAd's records concerning the Cryogenic and Cherokee transactions. MarAd officials also explained to them the structuring of both transactions.

42. In late August 1976 MarAd met with officials of the Securities and Exchange Commission and had later telephone conversations with them during which we explained the structuring of the Cherokee transaction including the role of Burmah and its subsidiaries.

43. On October 4, 1976 I and other officials of MarAd met with a representative of the Department of Justice and explained the structuring of the Cherokee transaction.

44. In short, the citizenship question raised in the documents submitted by the relator and in the complaint were known to and the subject of review, not only by MarAd, but also by other parts of the Government before the relator's action was commenced.

SAMUEL B. NEMIROW

Sworn to before me this
26th day of November, 1976.

Notary Public
My Commission Expires April 14, 1979

[EXHIBITS OMITTED]



**AFFIDAVIT OF CHARLES FRANKLIN RICHTER, FOR GOVERNMENT, IN SUPPORT OF MOTION**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA, by Dorothy S. Greenberg, for herself as well as for the United States of America,<br><br>Plaintiff,<br><br>— v —<br><br>THE BURMAH OIL COMPANY LIMITED, et al.,<br><br>Defendants. | AFFIDAVIT<br>76 Civ. 4351 (WK) |

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

CHARLES FRANKLIN RICHTER, being duly sworn, hereby deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York and attorney for the United States of America. I submit this affidavit in support of the motion to dismiss made by the United States.

2. At my request, the Chairman of the Committee on Government Operations of the United States House of Representatives

sent to Robert B . Fiske, Jr., a letter, dated November 29, 1976, a copy of which is attached as Exhibit "1" hereto. As I have been told by staff members of the Committee and as is stated in the letter, the Committee had in its possession prior to the commencement of this action the following documents among those listed in Schedule A to the complaint:

a. An undated 17 page memorandum which appears to be an internal memorandum of Burmah Oil Company, Ltd. (Item 1 on Schedule A)

b. A five page memorandum dated August 21, 1976, from Richard Kurrus to John McMullen (Item 3 on Schedule A)

c. A memorandum of law dated September 16, 1975, for Burmah Oil Tankers Limited prepared by Kurrus and Jacobi titled "Legal Status of the Present Ownership and Financing of the Pertamina LNG Vessels" (Item 4 on Schedule A)

d. Complaint of Burmah Oil Tankers Limited against Elias J. Kulukundis, et al. (Item 5(a) of Schedule A)

e. Complaint of Burmah Oil Company, Lts. against Energy Transportation Corporation, et al., dated November 6, 1975.

CHARLES FRANKLIN RICHTER
Assistant United States Attorney

Sworn to before me this
30th day of November 1976.

NOTARY PUBLIC



## EXHIBIT 1 TO RICHTER AFFIDAVIT — LETTER FROM CHAIRMAN OF COMMITTEE ON GOVERNMENT OPERATIONS OF U.S. HOUSE OF REPRESENTATIVES TO U.S. ATTORNEY ROBERT B. FISKE, JR. DATED NOVEMBER 29, 1976

Mr. Robert B. Fiske, Jr.
U. S. Attorney
Southern District of New York
U. S. Courthouse
Foley Square
New York, New York 10007

Re: United States by Dorothy Greenberg v. Burmah Oil Company Ltd., et al

Dear Mr. Fiske:

In your letter of October 22, 1976, your requested information regarding what, if any, documents the House Government Operations Committee has in its possession that were listed in the complaint filed on September 30, 1976, by Dorothy Greenberg against Burmah Oil Company, Ltd.

The following documents listed in the complaint were in the possession of the committee prior to September 30, 1976:

1. Confidential memo to John McMullen from Richard Kurrus consisting of 5 pages, dated August 21, 1975.

2. Memorandum of law for Burmah Oil Tankers Limited prepared by Kurrus and Jacobi titled "Legal Status of the Present Ownership and Financing of the Pertamina LNG Vessels" dated September 16, 1975.

3. Undated 17 page memorandum which appears to be an internal memorandum of Burmah Oil Company, Ltd.

4. Complaint of Burmah Oil Company, Ltd. against Energy Transportation Corporation, et al, dated November 6, 1975.

5. Complaint of Burmah Oil Tankers Limited against Elias J. Kulukundis, et al.

This information is provided in an effort to cooperate with you in carrying out your duties as U. S. Attorney. This response should not be taken to infer that the committee believes that documents in its possession are relevant to this action filed under the False Claims Act, Title 31 USC Secs. 231 and 232, nor is it to be treated as a precedent regarding any other requests for information in the committee's possession.

Sincerely,

JACK BROOKS
Chairman



**AFFIDAVIT OF RICHARD B. DANNENBERG, ESQ., FOR RELATOR, IN OPPOSITION TO MOTION**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA, by Dorothy S. Greenberg, for herself as well as for the United States of America, *Plaintiff*, | 76 Civ. 4351 (WK) |
| THE BURMAH OIL COMPANY LIMITED, et al., *Defendants.* | ANSWERING AFFIDAVIT |

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

RICHARD B. DANNENBERG, being duly sworn, deposes and says:

1. I am a member of the firm of Lipper, Lowey & Dannenberg (the "Lipper Firm") which, with the firm of Newman, Shook & Newman, P. C. of Dallas, Texas are the attorneys for the Relator, Dorothy S. Greenberg, in this action brought under the False Claims Act, 31 U.S.C. §231, *et seq.* for deliberate violations of and under the United States "Shipping Act 1916",

as amended, 46 U.S.C. §801, *et seq.*, and for deliberate violations as of and under the Merchant Marine Act of 1936, as amended (46 U.S.C. §§1101, et seq.). I make this affidavit in opposition to the motion of the United States of America, not a defendant, who has "appeared specially" to dismiss this action for lack of jurisdiction over the subject matter, pursuant to Section 232(C) of the False Claims Act (31 U.S.C. §232(C)). The Notice of Motion dated December 1, 1976 was served on the Lipper Firm on December 2, 1976. I also make this affidavit in opposition to the two page notice of motion dated and served December 6, 1976 by all the named defendants, except two, who similarly move to dismiss the action for lack of jurisdiction over the subject matter. Relator had informally extended the named defendants' time to move or answer the complaint to December 6th.

2. This action is brought on behalf of the United States of America (the "Government") to recover $79 million heretofore paid out, induced by and as a result of alleged false applications for financing for ship construction purposes under Titles V and XI of the Merchant Marine Act of 1936 (46 U.S.C. §§1151-1161; and §§1271-1276), (hereinafter referred to respectively as C.D.S. Financing and Title XI Financing or Title XI Guarantees); to nullify commitments made pursuant to those applications; and to prevent the Government from being committed to pay conditionally or otherwise substantially more.

3. This action was filed in this Court on September 30, 1976. That day Relator served on the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, a copy of the complaint and mailed registered mail to the



Attorney General of the United States at Washington, D.C. (i) a copy of the complaint, and (ii) copies of each of the ten documents, as more particularly listed on a Schedule A to the complaint, entitled "Statement of Disclosures on Behalf of Dorothy S. Greenberg Pursuant to Section 232(C) of Title 31 of the United States Code". The complaint is annexed hereto as Exhibit 1. Schedule A annexed to the complaint is annexed to this affidavit as Exhibit 2.

4. The basis for the Government's motion to dismiss is predicated on its alleged claim that the substantive information submitted to the Government by Relator was already in its possession, the Government replying upon that portion of Subparagraph (C) of Section 232 which states:

> "The Court shall have no jurisdiction to proceed . . . whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof at the time such suit was brought . . . ."

In its moving papers the Government concedes that prior to September 30, 1976, it did not have in its possession the document listed at Item 2 on Schedule A, namely "A memorandum dated May 12, 1975 from Richard W. Kurrus to John J. McMullen . . ." and did not have four of the other documents listed on Schedule A at Items 6, 7, 8(a) and 8(b) thereof. Annexed hereto as Exhibit 3, is the memorandum of May 12, 1975, hereinafter referred to as the "Kurrus Memorandum". Annexed as Exhibit 4, is Item 3 to Schedule A, a Memorandum dated August 21, 1975 also written by Richard Kurrus. Relator is prepared to deliver to the Court, if it so requests, each of

the other documents given to the Attorney General of the United States and listed on Schedule A. These documents were first received by the Attorney General on October 4, 1976.

The Government concedes that prior thereto, with the exception of two newspaper articles which are within the 66 page compilation of news releases (Item 6 on Schedule A), the Department of Justice (the Attorney General) never before had in its possession the ten documents. The Government does claim, however, that five of the documents, to wit Items 1, 3, 4 and 5(a) and 5(b), while not in possession of the Executive Branch of the Government, were in possession of the Committee on Government Operations of the House of Representatives prior to September 30, 1976, and that also Items 5(a) and 5(b) were in the possession of the Maritime Administration of the United States Department of Commerce ("MarAd"). As set forth at page 23A of the accompanying Memorandum of Law on behalf of Relator, the legislative history makes it evident that the fact that information may be in possession of Congress was not intended to bar a *qui tam* action.

Equally clear, also, is the fact that prior to September 30, 1976 the Government, i.e. the Executive Branch, the Legislative Branch and the Judicial Branch, did *not* have Item 2, 6 (with two minor exceptions), 7, 8(a) and 8(b). Nor had the information and documents been assembled.

5. The Government agency involved in the financing, which is the subject of the Relator's complaint, is MarAd. The Government in making its motion to dismiss relies principally on an affidavit of Samuel B. Nemirow, General Counsel of MarAd. who in his affidavit sworn to November 26, 1976, concedes at



Paragraphs 35 and 36 thereof that Items 1, 2, 3, 7, 8(a) and 8(b) of Schedule A to the complaint submitted by the Relator to the Department of Justice had never before been received by MarAd. As to Item 4 of Schedule A, a 63 page memorandum of law, Mr. Nemirow concedes never having had a copy of that document, although he claims to have been shown a copy at some time "in or about September 1975".

Annexed hereto as Exhibit 5A is a copy of letter dated October 7, 1976 (or October 8, 1976) from Richard L. Thornburgh, Assistant Attorney General to Congressman Aspin. That letter establishes that neither the Department of Justice, nor the S.E.C., nor the General Accounting Office had the information submitted on September 30, 1976 by Relator.

Anexed hereto as Exhibit 5B is correspondence dated October 2, 1976 from Congressman Les Aspin of the House of Representatives to the Honorable Elliot Richardson, Secretary of the Department of Commerce, and Secretary Richardson's response of November 17th discussing certain of the factual issues presented by this lawsuit, and particularly pending applications before MarAd on behalf of the defendants The Burmah Oil Company limited and General Dynamics Corporation, et al. At page 4 thereof Commerce Secretary Richardson refers to this litigation as follows:

> "As you may be aware, the forfeiture contention is currently the subject of civil litigation in federal district court in New York. In this civil action, most of the documents which have been the basis for media reports, such as *The New York Times* article of August 19, have been brought to light and as a consequence, MarAd has recently been able to review these documents — most of them for the first time. Nothing

> in them, including the "legal memorandum" by Richard Kurrus, would lead MarAd to change its belief that the LNG vessels are not subject to forfeiture."

That letter further states that the Commerce Department intends to take immediate action with respects to the pending applications referred to by Congressman Aspin prior to the "incoming administration" taking over. Further, Secretary Richardson states that the General Accounting Office has heretofore undertaken a review of the matter and to date has yet to disapprove of MarAd's course of action.

There is no affidavit from the General Accounting Office in the Government's moving papers. That agency never had presented to it or in its possession of any of the documents provided by Relator to the Attorney General on September 30, 1976. Otherwise they would have been presented presumably to the Department of Justice, but they were not. See Exhibit 5A anexed hereto.

6. As further evidence that the Government did not have all the information and documents assembled by Relator prior to September 30, 1976, and of the value of Relator's action, is the fact that Relator's counsel, the Lipper Firm, received a telephone request on October 18, 1976 from Gary N. Siendick of the Office of Branch Chief of Division of Enforcement of the Securities and Exchange Commission (Tel. #(202)-755-4110) who spoke with Burton L. Knapp of the Lipper Firm and requested the Lipper Firm to forward to Mr. Siendick copies of all the documents furnished to the Attorney General, listed on Schedule A to the complaint. On October 19, 1976 your deponent passed that request on to Assistant Attorney General Ridge



Loux (Tel. #(202)-739-3503) who had previously in early October advised me that he would be the Assistant Attorney General in charge of the action.

7. As the False Claims Act provides, the Government has sixty days to make a determination as to whether it wishes to take over prosecution of this *qui tam* action. That time expired on November 30, 1976. Not having heard from the Government, I, on Monday, November 29, 1976, called Mr. Loux to determine what position the Government was going to take with respect to the litigation inasmuch as the sixty day period under the False Claims Act was about to expire. He advised me to communicate with Assistant United States Attorney Schechter, office of the United States Attorney in the Southern District of New York. I called Mr. Schechter on November 29. Mr. Schecter advised me that he was about to serve motion papers returnable December 10th to dismiss for lack of subject matter jurisdiction. I requested that he make the matter returnable in January as I was leaving for a vacation. He indicated to me that under no circumstances could he grant any extensions of time; that it was essential that the motion be returnable December 10th because of pending applications before MarAd which were to be approved once this action is disposed of. It thus appears that the United States Attorney, moving to dismiss this action for lack of subject matter jurisdiction, has no intention to cause this action or a similar action to proceed or be prosecuted on behalf of the Government.

8. While the Government's moving papers carefully avoids discussing the merits of Relator's complaint, the Government through the Nemirow affidavit seeks to create the erroneous

impression, that the financing approved by MarAd, and about to be approved, which are the subject of this action has the imprimatur and support of the Goverment because it encourages the "growth and modernization of the United States Merchant Marine" (Nemirow affidavit ¶5; Government memorandum pp. 2-3). If in fact a foreign company controls the ships receiving United States subsidies, the legislative purpose of the statute as claimed by the Government will not be fulfilled. Further, if in fact false applications, certifications and affidavits were submitted to the Government, which induced it to grant the financing, neither this Court nor the Attorney General may refuse to enforce the law on the grounds that the "ends" justify the "means".

## THE ALLEGED FALSE APPLICATIONS SUBMITTED TO MARAD

9. The information hereinafter set forth in this affidavit is based upon and taken from documents presently in the possession of your deponent. Most of these documents come from the files of MarAd itself. An analysis of these documents leads your deponent to wonder why it took until September 30, 1976 for the facts to be brought to the attention of the Attorney General of the United States, as Relator has done by the filing of the instant action.

10. Anexed hereto are examples of the affidavits of citizenship and certain of the executed certifications to certain of the applications, for C.D.S. Financing and Title XI Financing which Relator claims were false and other materially important documents as follows:

Exhibit 6 — affidavit of citizenship by defendant John C.



Bullitt ("Bullitt") sworn to August 8, 1973 submitted to MarAd in connection with the initial applications on behalf of the defendants Cherokee I Shipping Corporation through Cherokee IV Shipping Corporation (the "Cherokee Companies").

Exhibit 7 — a certification execvuted by Bullitt in connection with and annexed to the initial applications of each of the Cherokee Companies.

Exhibit 8 — Letter from defendant General Dynamics Corporation under date of August 23, 1972 to one of the three Cryogenic Companies, accepted and approved by Durbin, committing to the execution of a vessel construction contract.

Exhibit 9 — a certification executed by Durbin in connection with and annexed to the pre-September 15, 1972 applications of each of the Cryogenic Companies.

Exhibit 10 — The unconditional guarantee of defendant Burmah Oil Company Limited ("Burmah") to MarAd under date of September 28, 1972.

11. The applications for C.D.S. Financing were first filed on July 14, 1972 and the applications amended on August 31, September 15, and September 20, 1972. On September 22, 1972 MarAd approved C.D.S. Financing and, on the same day, conditionally committed itself to granting Title XI guarantees provided that a number of conditions were met. On September 28, 1972, MarAd gave its initial approval to the time charter arrangements to a Burmah subsidiary. On August 9, 1974, MarAd finally approved the issuance of Title XI guarantees. Certain of the foregoing approvals were recommended by Robert

J. Blackwell, Assistant Secretary of Commerce for Maritime Affairs who is involved in the alleged subterfuge (See Exhibit 3 annexed).

12. Under date of September 28, 1972 Burmah had sent to MarAd its unconditional guarantee with respect to the Title XI Financing, stating:

> "We understand that, in order to enable you to give adequate review to the documents underlying said applications (including the proposed forms of demise charter and time charter), it may be necessary to delay the execution of the three construction contracts between the applicants and the Builder.
>
> Such being the case and in order to induce a prompt execution of the construction contracts, the undersigned hereby unconditionally and irrevocably guarantees that:
>
> (A) BOI will, regardless of circumstances, pay charter hire sufficient to meet periodic Title XI insured mortgage payments, as well as applicable Title XI insurance premiums, so long as the applicable vessel shall not be lost, requisitioned for title, forfeited, captured or seized, pay an amount sufficient to redeem in full the unpaid principal of and interest and premium (if any) on, the bonds secured by, and any other sums due under, such mortgage, and
>
> (B) If BOI shall default in any obligation, duty or undertaking incumbent upon it under the time charter of any document related thereto, the undersigned will duly and punctually perform such obligation, duty or undertaking." (Exhibit 10 annexed)

BOI, as referred to in the letter, is Burmah's wholly owned subsidiary, the defendant Burmah Oil Inc.

13. Previously, in a letter under date of September 15, 1972,



Theodore A. Ulrich of the firm of Cadwalader, Wickersham & Taft, Esq. advising that that firm represented the Cryogenic Companies as well as the defendants Citicorp Leasing Inc. and General American Transportation, outlined the entire transaction to Mr. Edward Fitzgerald of the Division of Mortgage Insurance Contracts of MarAd. In the course thereof he stated:

> "To finance the progress payments required to be made under the Construction Contract, the Owner Trustee and the Company, from time to time, will borrow on an interim basis the needed funds from the Bank under the Title XI Loan Agreement which will be insured under Title XI of the Act, and the Interim Loan Agreement which will not be so insured but will be guaranteed by Burmah Oil Tankers, Ltd. and Burmah Oil Company, Ltd."

14. Under date of September 28, 1972 Roy H. Yowell, Acting Chief, Office of Subsidiary Administration of MarAd forwarded to the Assistant Secretary of Commerce for Maritime Affairs, MarAd Form M521, for the purpose of recommending the Title XI Financing and stated

*Citizenship*

> "The United States citizenship of Cryogenics Energy Transport, Inc., Liquegas Transport, Inc., LNG Transport, Inc. (Three Companies), Summit, Wilmington Trust Company, Citicorp Leasing Inc. and General American Transportation Corporation *has been satisfactorily established during the past year*. In addition, the Lender/Mortgagee/Trustee has not been determined and therefore its citizenship is not yet established. Prior to the first closing the Lender/Mortgagee/Trustee will be required to submit satisfactory evidence of United States citizenship. The Three Companies, Wilmington Trust Company, Citicorp Leasing

Inc. and General American Transportation Corporation and the Lender/Mortgagee/Trustee will be required to submit evidence of continuing citizenship at each additional closing." (Emphasis added)

15. The initial applications for financing of July 14, 1972 and August 31, 1972 were executed on behalf of the Cryogenic Companies by Durbin who certified that the applicants were United States citizens and, upon information and belief, filed affidavits of citizenship referred to above. The amended applications for financing filed on or after September 15, 1972, were executed by the defendant Joseph J. Cuneo or by attorneys, and the affidavits of citizenship were filed by attorneys who were members of either the law firm of Cadwalader, Wickersham & Taft or the law firm of Richards, Layton & Finger, which certifications and affidavits were in the same form and content as those affidavits and certifications previously referred to. Except for those adavits of citizenship, upon information and belief executed by Durbin (who as hereinafter set forth, was associated with the Burmah complex of companies), the 1972 applications and affidavits of citizenship all were executed substantially by persons who were not in the shipping business but who principally were practicing attorneys. In other words, the corporations which were applicants for the financing were dummy corporations, acting upon the instructions of Burmah and its then principal executive officer, the defendant Elias J. Kulukundis.

16. Upon information and belief, the applications and information in MarAd's possession prior to September 30, 1972 disclosed in addition the following:

1. Under date of May 24, 1972 Public Service Electric and Gas Company of New Jersey and Algonquin Gas



Transmission (collectively "Escogas") entered into a Purchase Agreement dated May 24, 1972 with Societe National Sonatrach, an Algerian company, for the purchase of an aggregate of one thousand two hundred billion thermies of Liquid Natural Gas ("LNG") over a period of twenty-two years.

2. Under date of June 26, 1972 defendant Burmah Oil Tankers Limited entered into a Transportation Agreement with Escogas for delivery of LNG from Algeria to the eastern coast of the United States.

3.(a) Under date of July 12, 1972 the Cryognic Companies were each incorporated under the laws of Delaware.

(b) At August 14, 1972 the office of each of these corporations was at 1345 Avenue of the Americas, New York, N. Y.

4. Initially from July 14, 1972 and until at least September 12, 1972 all of the common stock of the Cryogenic Companies was owned by Durbin.

5. Initially and until September 13, 1972 the officers and directors of the Cryogenic Companies were defendant:

Durbin — Director, President
Hans H. Angermueller — Director, Secretary
Alvin E. Friedman — Director, Treasurer

6. Durbin on August 14, 1972, was:

(i) President and a Director of defendant Burmah Oil, Inc. and had held that position since November 1968; (ii) Chairman of the Board of defendant Burmah Oil Tankers, Limited, and had held that position since November 1970; (iii) President of Burmah Oil Development, Inc. and of Flexibox V.S. Inc., wholly owned subsidiaries of Burmah Oil, Inc. and Chairman of

the Board of Edwin Cooper, Inc., a wholly owned subsidiary of Burmah Oil Inc.

7(a) On August 14, 1972 Hans H. Angermueller ("Angermueller") was, and had been for five years, a partner in the New York City law firm of Shearman & Sterling.

(b) On August 14, 1972 Angermueller held an option to purchase any and all of Durbin's stock of the Cryogenic Companies at cost.

(c) On August 14, 1972, Alvin H. Friedman ("Friedman") was a partner in the investment banking firm of Kuhn, Loeb & Co.

(d) On August 14, 1972 and for several months prior thereto Kuhn, Loeb & Co. had been acting as investment bankers for defendant The Burmah Oil Company Limited and its subsidiaries and affiliates.

(e) On August 14, 1972, Friedman was a director of defendant Burmah Oil, Inc.

(f) In 1972 Shearman & Sterling had been retained by defendants Burmah Oil Company Limited, et al to represent them in connection with ship construction financing.

8. On September 12, 1972 the following persons, all partners in the law firm of Richards, Layton & Finger, Dupont Building, Wilmington, Delaware, attorneys for the Wilmington Trust Company of Delaware, became the officers and directors of the Cryogenic Companies:

Rodney M. Layton — President, Director
Barbara A. McKee — Secretary, Director
Thomas P. Sweeney — Treasurer, Director

9. Burmah had committed the Cryogenic Companies to enter into construction contracts with General Dynamics



Corporation and had agreed to underwrite or guarantee, unconditionally the transaction.

17. One can only conjecture as to how MarAd concluded on September 28, 1972 that Burmah was not in control of the Cryogenic Companies and that the United States citizenship of the Cryogenic Companies had been satisfactorily established, in view of all of the foregoing. Relator believes that if this action is permitted to proceed, it will be established that the applications were false and the approved financing based on a subterfuge as alleged by Relator's Complaint.

18. The damages to the Government are substantial. It has already paid out some $79 million, according to the Government's papers. The construction cost for the three vessels which are near completion is claimed to be $280 million. Approximately $150 million of the foregoing is allegedly guaranteed under Title XI Financing. The United States has guaranteed the prompt payment in full of interest and unpaid principal in the event of default in payment of funds borrowed to finance the construction. (Nemirow Affidavit ¶¶ 6 and 18).

If Burmah does not meet the interest payments and other carrying charges of the loans as well as the principal thereof when they become due, the United States Government will likely have to make those payments. This is not a remote possibility inasmuch as Burmah today is not financially a healthy company. Its financial plight is referred to in a footnote on the first page of Exhibit 14 of the moving papers. See also Exhibit 11 annexed, a financial statement for the six months ended June 30, 1976.

19. Annexed to the accompanying Memorandum of Law is an Appendix, which describes the defendants and their relation-

ship to the transactions, as alleged in the complaint, which information is also based upon documents in the possession of your deponent.

*Conclusion*

20. The Relator's *qui tam* complaint for the first time assembled substantial evidence for the Government and placed the false applications and claims for financing under the Merchant Marine Act of 1936 in their proper perspective. Concededly the Government, prior to September 30, 1976, did not have all the evidence, all the information and the documents furnished by Relator. No prosecutorial division of the Executive Branch had undertaken any meaningful action. No complaints had been filed. No indictments brought. Although the applications on behalf of Burmah were first filed with MarAd in 1972 and 1973, and although the Government claims MarAd was put on some notice in 1975 of the possibility of false claims having been filed with it, no proceeding or investigation had been commenced.

Presumably the legislative branch of the Government has been frustrated in its recent attempts to urge the Government to move. Now that Relator has done so, the Government, under the facts and circumstances in this action, should not be permitted to terminate on a technicality Relator's action.

Further, it is clear from the Government papers that jurisdiction rests under the statute in view of the fact that the Government has not established that the suit "was based upon evidence or information in possession of the United States, or any agency, officer or employee thereof" whose knowledge might properly be imputed to the Government.



Relator has provided a valuable service and has provided valuable information to the Government.

WHEREFORE, it is respectfully prayed that the motions of the Government and the defendants be denied in all respects.

RICHARD B. DANNENBERG

Sworn to before me this
8th day of December, 1976.

Harry P. Charal

[EXHIBITS OMITTED]

**SUPPLEMENTAL AFFIDAVIT OF RICHARD B. DANNENBERG, ESQ., FOR RELATOR, IN OPPOSITION TO MOTION**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, by Dorothy S. Greenberg, for herself as well as for the United States of America,

Plaintiff,

-v-

THE BURMAH OIL COMPANY LIMITED, et. al.,

Defendants.

76 Civ. 4351 (WK)
SUPPLEMENTAL ANSWERING AFFIDAVIT

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

RICHARD B. DANNENBERG, being duly sworn, deposes and says:

1. I make this affidavit to supplement my answering affidavit sworn to December 8, 1976 in opposition to the motions to dismiss this action for lack of subject matter jurisdiction.



Annexed hereto as Exhibit 12 is a numbered page document entitled:

> "A PROPOSAL TO JAPAN LINE, LTD.
> FOR THE FORMATION OF A TRANSPORTATION
> JOINT VENTURE OF LIQUIFIED NATURAL GAS"

dated May 29, 1975 from the files of the Burmah defendants.

Among other paragraphs of importance, we wish to call the court's attention particularly to the section entitled "BACKGROUND" on page 10 and particularly the paragraphs reading

> "The three Easco vessels were originally dedicated to the transportation of LNG from Algeria to the East Coast of the United States for a joint venture of two utilities ("Eascogas"). However, in July 1974 the Algerians rescinded the LNG sales contract underlying the transportation agreement. As a result of this action and the subsequent delay in formation of a new sales contract, Burmah has notified Eascogas that these ships could no longer be exclusively reserved for the Eascogas project. Instead, it is contemplated that these ships will be considered to fulfill the requirements of the transportation agreement which Burmah signed with Pertamina for the transportation of Indonesian gas to Japan. However, this is not definite and the possibility of a new transportation agreement with Easco is also being considered.
>
> In addition to these vessels, Burmah Tankers has also caused an additional five identical ships to be contracted at General Dynamics to service the Pertamina Transportation Agreement, . . ."

I also would like to call Your Honor's attention to Section VI entitled "PROFITABILITY" at page 17 wherein Burmah

projects anual net income between $54.8 million and $65.4 million with respect to the operation of eight L.N.G. vessels.

RICHARD B. DANNENBERG

Sworn to before me this
10th day of December, 1976.

Harry B. Charal



**EXHIBIT 12 TO DANNENBERG SUPPLEMENTAL AFFIDAVIT — DOCUMENT DATED MAY 29, 1975 ENTITLED "A PROPOSAL TO JAPAN LINE, LTD. FOR THE FORMATION OF A TRANSPORTATION JOINT VENTURE OF LIQUIFIED NATURAL GAS"**

# A PROPOSAL TO JAPAN LINE, LTD. FOR THE FORMATION OF A TRANSPORTATION JOINT VENTURE OF LIQUIFIED NATURAL GAS

Submitted by:

Burmah Oil Tankers Limited
1185 Avenue of the Americas
New York, New York 10036

May 29, 1975

## TABLE OF CONTENTS





### I *Introduction*

In recognition of Japan Line's willingness to discuss the cancellation of two five-year charters and in the interest of maintaining an ongoing relationship between Japan Line Ltd. and Burmah Oil Tankers, Ltd., this proposal is submitted for the purpose of investigating the possibility of a formation of a joint venture between Japan Line and Burmah Tankers for the transportation of liquified natural gas (LNG).

Under the suggested joint venture Japan would become the half owner of five 125,000 cubic meter LNG carriers which are presently under construction at the General Dynamics shipyard in Quincy, Massachusetts with the first of five vessels scheduled for delivery in November, 1977. Burmah Tankers and Japan Line would operate the ships jointly under a long-term LNG transportation agreement for the transportation of LNG from Indonesia to Japan.

In addition to the five LNG carriers which are the principal subject of this suggested joint venture, Burmah also has under construction three other LNG carriers also at General Dynamics, making a total of eight ships in all. At present, the first, second and fourth ships to be delivered are designated as the "Easco" ships and the remaining five ships considered in this proposal are designated as the "Cherokee" ships. In the case of the Easco ships, financing has been completely arranged and the first of the Easco vessels is scheduled for delivery in November, 1976. Because the financing has been arranged with Title XI and Construction Differential Subsidy ("CDS") has been approved for the Easco ships, they will be operated under U.S. flag conditions.

The Pertamina Transportation Agreement calls for eight ships and in the interest of giving Japan Line all of the basic information which they may require at this time, the statistics and financial results in this proposal will assume the use of eight ships with operating costs based on U.S. flag operations. While it would be possible to consider all eight ships in the joint venture, the possible requirement of repaying the CDS and arranging new financing would probably eliminate the Easco ships from the suggested joint venture. On the other hand, three additional LNG carirers would have to be included in the overall transportation system in order to satisfy the requirements of the Pertamina contract and these three additional LNG carriers could either be constructed at Quincy or at a Japanese shipyard or even possibly secured on the world market on a resale basis.

The transactions involved in establishing the possible joint venture and the servicing of the long-term transportation agreements are of necessity complex and subject to negotiations between Japan Line and Burmah Tankers. Therefore, it is the intent of this proposal to present a brief outline of the background and the main elements involved to serve as a basis for further discussions.

## II *The Partnership*

Burmah Oil Tankers Ltd., a Bermudian corporation and a wholly-owned subsidiary of The Burmah Oil Company, Limited, a Scottish corporation, is presently guaranteeing the construction and operation of eight 125,000 cubic meter LNG carriers under construction at the General Dynamics Shipbuilding Division in Quincy, Massachusetts. This program represents the



most extensive LNG transportation project underway anywhere in the world.

Burmah Tankers proposes a possible joint venture with Japan Line whereby Japan Line would become the 50% owner of five of these LNG carriers which would be operated to service a profitable long-term gas transportation contract between Indonesia and Japan. The transportation agreement requires seven and provides for a total of eight ships. The additional two or three ships could be either the so-called Easco ships, new buildings, or resales. The ships would be operated by either Japan Line and/or Burmah Oil Tankers and/or an independent management group. This is a point which would be resolved in the detailed negotiation.

As noted in the Introduction, the financing for the three Easco vessels is complete. While it would be theoretically possible to consider the Easco ships as part of the joint venture, these three vessels were constructed with U.S. government subsidies, requiring them to remain under U.S. flag while benefiting from U.S. government Title XI guaranteed financing. It is possible that repayment of the construction differential subsidy would allow us to alter the ownership and flag status of these vessels.

Burmah is now proceeding to make arrangements for the financing of the remaining five. These ships are the principal substance of this proposal. The advantages to Japan Line, as well as to the nation of Japan, from the proposed joint venture are generally as follows:

1. Japan Line would become the 50% owner of five of the most technically advanced vessels in the world. The average

construction price of these five Cherokee ships is approximately $96,000,000 but would cost in the range of $135,000,000 to $140,000 to duplicate today. This presents Japan Line with an unusual opportunity to expand their fleet with five of the most advanced ships in the world and will further provide Japan Line with an entry into the highly technical LNG transportation field.

2. Japan Line would be involved in the most extensive LNG transportation program in actual operation in the world. Most important Japan Line would save some four or five years of development because in order to independently commence an LNG program of this magnitude, Japan Line would require at least four or five years to reach the same status as the Burmah program.

3. Japan Line would be provided with all of the technology to be able to develop the necessary technical and operating experience for the acquisition and operation of additional LNG vessels either independently or as an extension of the Japan Line-Burmah joint venture. While the subject LNG carriers are intended for commitment to servicing the transportation contract with Pertamina for LNG from Indonesia to Japan, it is possible to substitute other LNG vessels under the Pertamina contract, leaving the Japan Line-Burmah joint venture vessels free for transportation of LNG in other areas of the world. There are several other programs under actual consideration at this time and depending upon the development of the proposed joint venture, these additional LNG projects could be possible means of either developing the



joint venture or providing Japan Line with an independent development of their own.

5. The transportation agreement with Pertamina provides a profitable long-term contract and all of the associated terminal liquefaction plants and the other supporting part of the system required for an LNG transportation system are certainly under construction and are scheduled for completion in approximately March, 1977. This means that the vessels will have immediate and profitable employment and will ensure the economic feasibility of the construction from the very beginning.

6. At the conclusion of the long-term 20-year contract, the ships will have an additional 4½ to 7½ years of service (depending on whether certain options of the long-term contract are exercised) and the residual value at the end of 27½ years would be in excess of $20,000,000.

7. Because the LNG will be sold to Japan, the Japanese balance of payments would benefit by Japan Line's participation in this project. Furthermore, the participation by Japan Line in the venture would be of national significance and enhance the reliability and approach covering the transportation of LNG into Japan.

8. If the joint venture were created and Japan Line gained 50% equity in the LNG carriers, that 50% equity would immediately represent an increased value of $20,000,000 per ship to Japan Line in view of the fact that new contract would be at least $40,000,000 higher in the market today. It is recognized that this might be questioned on the basis that

the purchase of resale contracts and/or ships might be possible but these can only be obtained in limited number and furthermore the companies which presently own these contracts recognize the potential value of them. It is believed that resales can only be considered as a supplement to the basic Pertamina Transportation Agreement.

The advantage to Burmah from the proposed joint venture is a relief from the financial guarantee presently required for the construction of the ships and for the guarantee of the time charter over twenty years operation. The requirement of Burmah to reduce some of its financial exposure at this time is the driving force behind this proposal. In addition, Burmah recognizes that the proposed joint venture with Japan Line would ensure a far better relationship with the Japanese utilities and in securing the approval of all of the necessary Japanese regulatory bodies. Most important, of course, is that the joint venture with Japan Line would be dependent upon the willingness of the Japanese banks to provide the necessary long-term financing for the construction of the vessels and permit the elimination or modification of the Burmah Oil guarantee on the charter.

The following section presents a brief description of the background and further information for Japan Line's consideration.

## III *Background*

All eight vessels are being constructed by the General Dynamics Shipbuilding Division at Quincy, Massachusetts. These vessels are now estimated for delivery from November 1976 to April 1979 at three to six month intervals.

The three Easco vessels were originally dedicated to the



transportation of LNG from Algeria to the East Coast of the United States for a joint venture of two utilities ("Eascogas"). However, in July 1974 the Algerians rescinded the LNG sales contract underlying the transportation agreement. As a result of this action and the subsequent delay in formation of a new sales contract, Burmah has notified Eascogas that these ships could no longer be exclusively reserved for the Eascogas project. Instead, it is contemplated that these ships will be considered to fulfill the requirements of the transportation agreement which Burmah signed with Pertamina for the transportation of Indonesian gas to Japan. However, this is not definite and the possibility of a new transportation agreement with Easco is also being considered.

In addition to these vessels, Burmah Tankers has also caused an additional five identical ships to be contracted at General Dynamics to service the Pertamina Transportation Agreement, the basic terms and conditions of which are summarized in Section V of this proposal. This agreement provides a major advantage in that the Indonesian liquefaction plant is scheduled for completion in early 1977. In most LNG transportation projects, it is not unusual for the first vessel to be delivered and proceed directly into layup to await the completion of the liquefaction plant.

The Easco ships are being constructed with Construction Differential Subsidies of $21,252,000 per ship and Title XI guaranteed financing provided by the U.S. Government. The remaining five have a preliminary commitment for U.S. Government Title XI construction financing and Construction Differential Subsidy is not contemplated. The U.S. Government provides these shipbuilding incentives with the requirement that the

vessels be operated under U.S. registry with at least 51% U.S. ownership. As noted previously, registration under non-U.S. flag of the Easco ships would possibly require repayment of the construction subsidies. Even with repayment of subsidy the construction costs are less than $95,000,000 and could not be duplicated anywhere else in the world.

As noted the construction and long-term financing for the Easco vessels has been arranged. The ownership of these three vessels rests in a financial group led by the First National City Bank and includes The First National Bank of Chicago and General American Transportation Corporation (GATX), a major transportation leasing company. In the case of the second series of five ships, neither the construction nor long-term financing arrangements are yet complete and, at the present time, Burmah Oil is providing the funds for the construction of these five ships. Steps will soon be taken to arrange both the construction and long-term financing. Therefore, if non U.S. flag operation is to be considered, a decision must be made before U.S. financing is finalized.

While the details of ownership and operation are complex, all eight ships are, in one form or another, guaranteed by Burmah. Since Burmah is to be the long-term charterer of the ships, and it has guarantee construction financing and the time charter payments, that supports the long-term financing. Clarification of the various interrelationships can be provided. At this time, it is sufficient to state that the purpose of the different corporations is to provide you U.S. construction benefiting for Title XI financing.

As has been noted in the press, the financial losses incurred by Burmah Tankers in 1974 in connection with their fleet of



forty-eight crude oil carriers, has made it necessary for the Bank of England to guarantee $650,000,000 of loans to Burmah Oil until December 31, 1975. This financial crisis developed not because of the LNG vessel program, but because of the results of the operating fleet and the significant impact of the potential financial liability when the total of Burmah's long-term financial guarantees are considered. Obviously, this has a significant impact on the credit reliability of the overall Burmah Oil guarantee. Nonetheless, Burmah Oil is confident that the construction and long-term financing for the five Pertamina ships will be arranged prior to the end of 1975 because:

1. the economic advantages of the Transportation Agreement with Pertamina,

2. the interest and requirement of the Japanese utilities as the users of the LNG to be transported.

3. LNG ships under construction at General Dynamics represent values which could not be repeated in the present market.

4. the potential demand for LNG ships in significant numbers.

At the same time, however, it is recognized that all possible alternatives should be considered. One of these alternatives would be the 50% joint venture with Japan Line covering the five Cherokee ships. While such a plan may require the approval of the U.S. Maritime Administration, preliminary indications are that such approval would be forthcoming. In the event of preliminary interests, this approval could be obtained in principle. Under such a plan, the Joint Venture would not be entitled

to U.S. Construction Differential Subsidies, which have been obtained for the Easco ships, nor the Title XI guaranteed financing for both the construction loans. This means that the financing would have to be provided solely on the credit of the Joint Venture, the Pertamina Transportation Agreement, and the credit of the Japanese and users.

Because of the financial situation in which Burmah Oil presently finds itself, it is reviewing all alternatives in connection with its profitable and progressive liquefied natural gas transportation program.

The average contract price for all eight ships is approximately $88,000,000 and there is no question but that the effort to duplicate these ships in the present world financial conditions would require a minimum of $135,-$140,000,000 per ship. It can be readily established, therefore, that the contracts for these ships have a market value of at least $40,000,000 per ship in excess of the present fixed price contracts with General Dynamics.

In addition, the Pertamina Transportation Agreement requires the long-term utilization of seven ships and provides for utilization of the eighth. The terms and conditions of the overall transportation agreement provide for a fair and reasonable profit factor after depreciation and operating costs are covered.

Therefore, Burmah proposes that the proposed joint venture purchase the five Cherokee ships. The responsibility of Japan Line as the 50% purchaser would be to provide the financing guarantees and 50% equity for the five ships under the terms and conditions of the contracts presently in force with General Dynamics and to permit the elimination of the Burmah Oil



guarantee on the time charters and the Pertamina Transportation Agreement.

Assuming an equity investment of 20%, or approximately $23,000,000, Burmah and Japan Line would each contribute $11,500,000 per ship and Japan Line would provide the necessary guarantees for the remaining costs or approximately $91,000,000 per ship. In summary, Japan Line and Burmah would invest $57,000,000 each and Japan Line would arrange the financial guarantee for the remainder of about $457,000,000 including interest during construction, for a total of $572,000,000.

All of the above costs are covered by the transportation agreement.

## IV *The Ships*

The characteristics of the eight identical ships are summarized in Exhibit 1. This Exhibit was prepared by the builder, General Dynamics Corp., as promotional literature, but presents a concise summary of the vessel characteristics. The prices of the individual vessels vary according to their delivery schedule, due to escalations in the building contracts. The "capitalized costs" of each vessel include all costs of procuring the vessels and placing them in service, which costs include, in addition to the construction price, the interest and other financing charges on the construction loans, and the costs of inspection and supervision of construction. The delivery schedule, prices, and esti-

mated capitalized cost at delivery date are currently as follows:

| Ship | Builders' Hull # | Builders' Estimated Delivery as of 20 Feb. 1975 | Contract Price with Changes (in $ millions) | Estimated Capitalized Cost at Delivery |
|---|---|---|---|---|
| 1 | 41 | 11/25/76 | 73.0* | 91.6 |
| 2 | 42 | 5/07/77 | 73.0* | 90.4 |
| 3 | 44 | 11/26/77 | 94.5 | 112.2 |
| 4 | 46 | 3/11/78 | 73.0* | 90.7 |
| 5 | 47 | 7/15/78 | 94.5 | 113.0 |
| 6 | 50 | 10/07/78 | 97.4 | 115.8 |
| 7 | 48 | 1/13/79 | 94.5 | 113.0 |
| 8 | 49 | 4/07/79 | 98.5 | 117.7 |

V *The Transportation Agreement*

The Transportation Agreement is between Pertamina and Burmast East Shipping Corporation, a majority owned subsidiary of Burmah Oil Tankers Limited. Its principal points are:

1. *Transportation to be Furnished:*

The Transportation Agreement requires seven and provides for eight 125,000 $m^3$ capacity LNG carriers be dedicated by Burmah and owned and operated by Burmah or persons approved by Burmah. The dedication of the eighth vessel is dependent on gas availability. The vessels are to be placed in service under the agreement as follows:

* Does not include $21.3 per vessel Construction Differential Subsidy by U.S. Government for the three Easco ships.



| Ship No. | Date |
|---|---|
| 1 | March 1, 1977 |
| 2 | June 30, 1977 |
| 3 | January 1, 1978 |
| 4 | August 1, 1978 |
| 5 | January 1, 1979 |
| 6 | September 30, 1979 |
| 7 | January 1, 1960 |
| 8 (assumed) | September 30, 1980 |

2. *Term of Transportation:*

The term of service is twenty years for each vessel from commencement of service with option for three additional years on each vessel.

3. *Quantities to be Transported, Origins Destinations:*

The LNG is to be transported from East Kalimantan and North Sumatra, Indonesia, to Japan, beginning in 1977 at 3,910,000 $m^3$ per year from 1980 through 1996, and thereafter declining to final delivery of 3,840,000 $m^3$ in 1999. See Exhibit 2 for details.

4. *Freight:*

a. *Base Rate:*

For required "Aggregate Annual Quantity" per paragraph 3 above: shipments from E. Kalimantan $5.836 per $m^3$ loaded; shipments from North Sumatra $7.403 per $m^3$ loaded.

b. *Additional Annual Quantity:*

Quantities transported in excess of Aggregate Anual Quantity: from E. Kalimantan $4.227 per $m^3$ loaded; from North Sumatra $5.361 per $m^3$ loaded. Additional annual quantity estimated to be 10% of Aggregate Annual.

c. *Minimum Freight:*

Ship or pay amounts based on Aggregate Annual quantities, subject, however, to reduction for quantities not shipped due to *force majoure:* $22,819,000 in 1977 rising to $199,533,000 for years 1980 to 1996 and thereafter decreasing to $28,428,000 in 1999. (See Exhibit 3.)

d. *Adjustment of Freight Rates:*

Base Freight rates will be adjusted for (1) increase or decrease in Annual Operating Costs over specified base per ship, (2) "unavoidable" costs incurred after initial required availability date and caused by non-utilization by Pertamina; (3) increase in construction cost of vessels 1, 2, and 3 (Hull #44, 47 and 50) over $92.0 million per ship due to changes required by Pertamina or regulatory agencies; and (4) increases in construction cost of dedicated vessels 4, 5, 6 and 7 (Hull #48, 49 plus additions) over $92.0 million per ship for any reason.

VI *Profitability*

For each full year of operation of eight vessels profitability is estimated as follows:

| | Lower Projection | Upper Projection |
|---|---|---|
| Gross Income | $136,604,000[1] | $147,232,000[2] |
| Operating Cost[6] | 36,456,000 | 36,455,000[3] |
| Depreciation of Capitalized Cost[4] | 45,403,000 | 45,403,000 |
| Net Income | $ 54,845,000 | $ 65,373,000 |



Total profitability analysis should also take into consideration that the estimated service life of the ships is at least 27½ years and there is a residual value of at least $10,000,000 per vessel at the end of estimated service life.[5]

1. Annual Aggregate Quantities x Base Freight Rates.
2. 110% of Annual Aggregate Quantities with 7.5% of excess quantity rates.
3. Excess operating costs for transporting excess quantities are fully reimbursed under the adjustment in freight rate provisions of the transportation agreement.
4. Depreciation is based on 20 years.
5. "Based on the above analysis of the factors affecting the useful life, and in consideration of the resale and/or scrap value of the vessels, it is our opinion that the estimated serviceable life is at least 27½ years, and that at the end, the vessels will have an estimated residual value of not less than 21.46% of their original cost."
6. Operating costs are based on U.S. flag operation.

VII *The LNG Transportation Market*

Since the vessels are assured profitable employment under the Pertamina Transportation Agreement ensures the financial success of this proposed joint venture. If it is decided to substitute other vessels to service the Pertamina agreement, the ships offered in this proposal are still assured of profitable employment.

Future energy needs are such that the demand for gas cannot but grow. The increasing emphasis on environmental considerations in major industrial nations has rapidly increased the de-

mand for such "clean" fuels beyond previously predicted limited.

A recent LNG trade forecast completed by Shell International Gas Limited predicts an LNG ship requirement for the mid/late 1980's as follows:

| | Number of 120,000 $m^3$ capacity ships | |
|---|---|---|
| Market Serviced | Lower Level | Upper Level |
| U.S.A. | 40 | 100 |
| Japan | 25 | 50 |
| Western Europe | 10 | 20 |
| TOTALS | 75 | 170 |

LNG carriers currently built or under firm order number are reported to be 67 and in terms of 120,000 $m^3$ equivalents the number built or on order is 55. Clearly the demand for LNG carriers in the mid to late 1980's is in excess of demand.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-492

UNITED STATES OF AMERICA,

*Respondent,*

by DOROTHY S. GREENBERG,
for herself as well as for the United States of America,

*Petitioner,*

—against—

THE BURMAH OIL COMPANY LIMITED, BURMAH OIL INCORPORATED, BURMAH OIL TANKERS LIMITED, BETHEL MARINE, INC., SOUTHHOLD MARINE, INC., VERMONT MARINE, INC., BURMAST EAST SHIPPING CORP., BURMAH GAS TRANSPORTATION LIMITED, ELIAS J. KULUKUNDIS, SUMMITT MARINE OPERATIONS, INC., SUMMITT I, INC., SUMMITT II, INC., SUMMITT III, INC., CHEROKEE I SHIPPING CORPORATION, CHEROKEE II SHIPPING CORPORATION, CHEROKEE III SHIPPING CORPORATION, CHEROKEE IV SHIPPING CORPORATION, CHEROKEE V SHIPPING CORPORATION, ENERGY TRANSPORTATION CORPORATION, C. Y. CHEN, JOSEPH J. CUNEO, JEROME SHELBY, CRYOGENIC ENERGY TRANSPORT, INC., LNG TRANSPORT INC., LIQUEGAS TRANSPORT INC., JAMES DURBIN, JOHN C. BULLITT, FIRST NATIONAL CITY BANK, CITICORP LEASING, INC., GENERAL AMERICAN TRANSPORTATION CORP., GENERAL DYNAMICS CORPORATION, CITIMARLEASE (BURMAH I), INC., CITIMARLEASE (BURMAH LNG CARRIER), INC., CITIMARLEASE (BURMAH LIQUEGAS), INC., and CITICORP,

*Defendants-Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF DEFENDANTS-RESPONDENTS IN OPPOSITION

November 2, 1977

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### TABLE OF CASES AND AUTHORITIES

IN THE

# Supreme Court of the United States

October Term, 1977

No. 77-492

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UNITED STATES OF AMERICA,
*Respondent,*
by DOROTHY S. GREENBERG,
for herself as well as for the United States of America,
*Petitioner,*

—against—

THE BURMAH OIL COMPANY LIMITED, BURMAH OIL INCORPORATED, BURMAH OIL TANKERS LIMITED, BETHEL MARINE, INC., SOUTHHOLD MARINE, INC., VERMONT MARINE, INC., BURMAST EAST SHIPPING CORP., BURMAH GAS TRANSPORTATION LIMITED, ELIAS J. KULUKUNDIS, SUMMITT MARINE OPERATIONS, INC., SUMMITT I, INC., SUMMITT II, INC., SUMMITT III, INC., CHEROKEE I SHIPPING CORPORATION, CHEROKEE II SHIPPING CORPORATION, CHEROKEE III SHIPPING CORPORATION, CHEROKEE IV SHIPPING CORPORATION, CHEROKEE V SHIPPING CORPORATION, ENERGY TRANSPORTATION CORPORATION, C. Y. CHEN, JOSEPH J. CUNEO, JEROME SHELBY, CRYOGENIC ENERGY TRANSPORT, INC., LNG TRANSPORT INC., LIQUEGAS TRANSPORT INC., JAMES DURBIN, JOHN C. BULLITT, FIRST NATIONAL CITY BANK, CITICORP LEASING, INC., GENERAL AMERICAN TRANSPORTATION CORP., GENERAL DYNAMICS CORPORATION, CITIMARLEASE (BURMAH I), INC., CITIMARLEASE (BURMAH LNG CARRIER), INC., CITIMARLEASE (BURMAH LIQUEGAS), INC., and CITICORP.,
*Defendants-Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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## BRIEF OF DEFENDANTS-RESPONDENTS IN OPPOSITION

## Question Presented

Was the Court of Appeals correct in unanimously affirming the District Court's dismissal of this action for lack of subject matter jurisdiction pursuant to 31 U.S.C. § 232(C) where:

> (a) the Government established that the action was based upon "evidence or information within [its] possession" prior to suit and sought dismissal on that ground;
>
> (b) by the time petitioner's complaint was filed, the "fraud" it alleged was already under investigation by no less than four federal authorities, including the Department of Justice; and
>
> (c) the same allegations had also been prominently reported by the press prior to petitioner's suit—particularly in a front-page *New York Times* article, which appeared a month and a half before the complaint was filed?

Petitioner seeks to persuade this Court to hear a case not in conflict with prior decisions of this or any other court, involving neither a significant question nor a unique interpretation of federal law and in which her contentions have been rejected by every judge who has considered them.

There is no issue worthy of *certiorari*.

## Statement of the Facts

On September 30, 1976, petitioner Dorothy Greenberg commenced a *qui tam* action under the False Claims Act, 31 U.S.C. §§ 231 *et seq.* (1970 & Supp. V 1975) (the "Act"), seeking damages on behalf of the United States and a substantial bounty for herself. The essential allegation contained in her 23-page complaint is that the respondents participated in or knowingly aided and abetted a conspiracy to defraud the United States by requesting certain subsidies and loan guarantees in connection with the construction of liquefied natural gas tankers.



Specifically, petitioner alleged that several of the defendants-respondents applied to the Maritime Administration for construction differential subsidies pursuant to Title V of the Merchant Marine Act of 1936, 46 U.S.C. §§ 1151 *et seq.* (1970 & Supp. V 1975), and for ship mortgage guarantees pursuant to Title XI of the Merchant Marine Act of 1936, 46 U.S.C. §§ 1271 *et seq.* (1970 & Supp. V 1975), both of which are available only to United States citizens within the meaning of the Shipping Act, 1916, as amended. 46 U.S.C. § 1274(a) (Supp. V 1975), 46 U.S.C. § 1151(c) (1970). According to petitioner, the applications falsely represented that the relevant parties were United States citizens. Together with her complaint, she tendered nine documents and a collection of news clippings, listed in Schedule A thereto, which she claims indicate that by filing the applications, the defendants-respondents made false claims against the United States.* (A-23 through A-99)**

On December 1, 1976, the United States Attorney for the Southern District of New York moved to dismiss the complaint pursuant to section 232(C) of the Act, which provides that:

> "[t]he court shall have no jurisdiction to proceed with [a *qui tam* suit] whenever it shall be made to appear

---

* Section 232(C) of the Act requires a relator commencing suit under section 232(B) to serve upon the Attorney General "a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit".

** References to "A-...." are to Petitioner's Appendix herein.

that such suit was based upon *evidence or information* in the possession of the United States, or any agency, officer or employee thereof at the time such suit was brought. . . ." (emphasis added)

The defendants-respondents joined in that motion.

As the Government's moving papers demonstrated, prior to the filing of the present action, numerous investigations into allegations of non-compliance with the citizenship requirements of the Shipping Act had already been commenced by various executive agencies, a congressional committee and the General Accounting Office. The Government's papers also detailed the extensive underlying data in its possession upon which such investigations were based. The abundant contemporaneous press coverage of those same allegations and events was noted. Of particular significance were articles appearing in the August 19 and 21, 1976 editions of *The New York Times* wherein the transactions in question were described in detail and several documents tendered by petitioner as a basis for this action were specifically identified and quoted.*

Judge Whitman Knapp granted the Government's motion to dismiss on December 22, 1976, stating:

"The alleged fraud which the relator seeks to redress was the subject of an inquiry in March, 1976 by

* For example, the August 19th article begins:

"The Securities and Exchange Commission, the Federal Maritime Administration and at least one Congressional committee are investigating whether the Burmah Oil Company, a major British concern, illegally received commitments for Federal guarantees or subsidies to build at least eight huge tanker ships in this country. . . .

• • •

"At issue is whether the ships have any right to American subsidies or loan guarantees, since Burmah is not an American company. Federal law specifies that only domestic concerns can receive such Government backing." (A-60)



Congressman Les Aspin. In May, 1976, the Congressman referred the matter to the House Committee on Government Operations and to the Department of Justice; both commenced investigations. In early September the SEC began its own inquiry into the corporate transactions involved. Moreover, in August the alleged scandal was brought to the public's attention by a series of articles published in the *New York Times*, and was subsequently carried by other newspapers."

As to the documents tendered by petitioner, the Court found that:

"[w]ith possibly one exception those documents, or the information contained in them, were within the actual possession of one or another government body before the complaint was filed."

Furthermore, with respect to the one possible exception, the so-called "Kurrus Memorandum," Judge Knapp found that it

"was specifically identified and fully described in an August *New York Times* article. As a result, the information it contained was public knowledge".* (A-12)

* That document, upon which relator premises her entire petition to this Court, was identified and discussed in the August 19th front-page *New York Times* article:

"In a memorandum to John J. McMullen, former president of Burmah Oil Tankers, Richard Kurrus of the Washington law firm reported that he had engaged in a conversation about Burmah on May 8, 1975, with Mr. Blackwell, the Assistant Secretary of Commerce, and Samuel Nemirow, assistant general counsel of the Maritime Administration.

Mr. Kurrus reported that he met with Mr. Blackwell for lunch later the same day and Mr. Blackwell said he felt that Elias J. Kulkundis [sic], an earlier president of Burmah Oil

(footnote continued on following page)

Petitioner appealed the District Court's order of dismissal to the United States Court of Appeals for the Second Circuit. At the close of oral argument on May 11, 1977, the panel, consisting of Judges Lumbard, Meskill and Jameson,* unanimously affirmed. In its subsequently filed *per curiam* opinion, the Court upheld Judge Knapp's finding that the Government actually possessed all but one document proffered by petitioner and that that document was publicly identified and described in the press. (A-2 through A-7) The Court also specifically rejected plaintiff's theory that her assembling information already in the Government's possession was sufficient to confer jurisdiction by stating that:

> "[t]he statute is clear and explicit. Jurisdiction is defeated by the government's possession of the information." (A-6)

Thereafter, petitioner moved for reargument and rehearing *en banc*. Both motions were unanimously denied. (A-8 and 9)

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(footnote continued from previous page)

> Tankers, 'may have acted imprudently and perhaps even improperly in the deals he set up.'
>
> Mr. Kurrus quoted Mr. Blackwell as saying that he was aware that problems had arisen over the Title XI financing and that 'everyone recognized' that the formal arrangement approved by the Maritime Administration 'was based on friction [sic].' "

This article, as petitioner concedes (Petition at 10), was in the Government's possession prior to the commencement of the present action.

* Hon. William J. Jameson of the District of Montana sitting by designation.



## ARGUMENT

### POINT I

**Petitioner's Position, Which Failed To Gain Even A Single Vote From Any Judge Below, Does Not Merit Review By This Court.**

Stripped of its verbiage, petitioner's appeal is limited to the narrow facts of this particular case,* which facts were the subject of concordant findings by the District Court and the Court of Appeals. There is no showing by petitioner, nor could there be, that an "obvious and exceptional error" is presented here which should cause this Court to review the unanimous findings below. *See United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *District Director*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

The correctness of the determinations below is particularly apparent here because the statute requires a relator to designate in writing "substantially all evidence and information in his possession material to the effective prosecution of such suit" and then mandates comparison to the "evidence or information" in the Government's possession. 31 U.S.C. § 232(C). Thus, the trial court and the Court of Appeals undertook a thorough comparison between the information contained in the 232 pages of documents submitted by petitioner and the information already in the possession of the "United States, or any agency, officer or employee thereof" as was set forth in the Government's

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* Petitioner attempts to raise legal questions concerning the construction of the Act but, as explained below, the case law and the legislative history of the Act unanimously support respondents' position. Thus, no real question of law is presented by this appeal.

two hundred page submission below.* We respectfully submit that repetition by this Court of such a time-consuming review, after petitioner failed to convince a single judge below that her position has any merit whatsoever, constitutes an unwarranted intrusion into this Court's time and energies. Indeed, as this Court emphasized in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co., supra:*

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." 336 U.S. at 275 (citations omitted)

No such showing has been or can be made here, and, accordingly, the petition should be denied.

## POINT II

### The Legal Standard Applied Below In Determining Lack Of Jurisdiction Is Correct And Consistent With The Decisions Of Other Courts Which Have Considered The Question.

The only issue presented by the statute and decided below was whether petitioner's suit was based on information in the possession of the Government on the date she commenced her action—September 30, 1976. If it was, subject matter jurisdiction is lacking.

Both courts below as well as all of the other courts which have had occasion to consider the standard to be applied

* Indeed, the Court of Appeals had before it as Annex B to the Brief of Defendants-Appellees (Respondents) a tabular comparison of petitioner's documents and the governmental agency which possessed the information therein prior to September 30, 1976.



in determining this issue have consistently employed a qualitative standard. Under such a standard, a district court has no jurisdiction over a *qui tam* suit where the material or essential information upon which the citizen's suit is based was in the possession of the Government at the time the suit was filed. This test was succinctly stated in *United States* v. *Aster,* 176 F.Supp. 208 (E.D. Pa. 1959), *aff'd,* 275 F.2d 281 (3d Cir.), *cert. denied,* 364 U.S. 894 (1960), where the District Court, in dismissing an action similar to petitioner's for lack of jurisdiction, held:

> "[T]he *essential* information upon which the present suit is predicated was supplied to and was in the possession of the United States before this suit was filed." 176 F.Supp. 209 (emphasis added)

In affirming that dismissal, the Court of Appeals specifically endorsed the "essential information" standard. 275 F.2d at 282. *Accord, United States ex rel. Thompson* v. *Hays,* Civ. Action No. 76-1078 (D.D.C. October 30, 1976), *appeal dismissed,* Dkt. No. 76-2151 (D.C. Cir. March 18, 1977) ("crucial evidence or information"); *United States ex rel. Vance* v. *Westinghouse Electric Corp.,* 363 F. Supp. 1038 (W.D. Pa. 1973) ("essential information"); *United States ex rel. McLaughlin* v. *American Chain & Cable Co.,* 62 F. Supp. 302, 303 (S.D.N.Y. 1945) ("material information").

This same standard was correctly applied in the present case. Not only did both courts concur that at the time petitioner filed suit the Government physically possessed all but one of the actual documents tendered by her but, as to that one, (the "Kurrus Memorandum", *see* p. 5, n., *supra*) the Court of Appeals specifically found that

> "[t]he government's possession of the material information contained in the memorandum is enough under the statute to divest the court of jurisdiction". (A-6)

**Thus, the lower courts correctly applied a "material evidence" standard consistent with prior decisions of other courts which have considered the question.**

Despite the clear words of the statute, petitioner also argues that the lower courts' interpretation of the Act was erroneous in that section 232(C) should operate to preclude *only* "parasitical" suits, *i.e., qui tam* actions based solely on publicly available information. Such an interpretation is not only contrary to the plain language of the statute, but to the legislative history of the Act and to all of the case law on the subject. For example, in spite of its length, petitioner's prolix examination of the legislative history of the Act is conspicuously incomplete in that it addresses only an early Senate version of the bill and ignores the conference bill which was ultimately enacted. The version of the bill originally passed by the House entirely abolished private suits under the Act, *see United States* v. *Pittman*, 151 F.2d 851, 853 (5th Cir. 1945), *cert. denied*, 328 U.S. 843 (1946), while the Senate bill would have allowed suits

> "based upon information, evidence and sources original with [relator] and not in the possession of or obtained by the United States in the course of any investigation or proceeding by it. . . ." S.Rep.No. 291, 78th Cong., 1st Sess. (1943), *reprinted* in [1943] U.S. Code Cong. Serv. 2.324 at 2.325.

Thereafter, the conference committee adopted the language in the jurisdictional section of the present statute. Judge Hastie related the Senate debate which followed the conference committee's action in *United States* v. *Aster*, *supra:*

> "Particularly noteworthy is the debate which ensued in the Senate where *Senator Langer* vigorously attacked the conference compromise as practically abolishing the qui tam procedure and *proposed* resubmission of the matter to the conference committee with instructions that the Senate conferees insist *that only the parasitical action of the relator who uses public information as the basis of his suit*—the situation of United States ex rel. Marcus v. Hess—*should be abolished.* 89 Cong. Rec. 10746-51. *However, the Senate rejected this motion and adopted the conference report.* 89 Cong. Rec. 10752." 176 F.Supp. at 209-10 (emphasis added)



Thus, not only do the clear words of the statute preclude private suits where the Government already had possession of the essential information, but the contrary interpretation urged by petitioner was specifically rejected by Congress in its debate. Moreover, judicial decisions interpreting section 232(C) confirm that it was intended to bar *all* suits where the United States had the essential information at the time the suit was filed and not just "parasitical" suits, as petitioner uses that term.* For example, petitioner's copious quotation from and exclusive reliance on *United States ex rel. Davis* v. *Long's Drugs, Inc.*, 411 F.Supp. 1144 (S.D. Cal. 1976) (Petition at 40-42) is notably incomplete in that it omits the paragraph immediately preceding the quoted portion which is directly contrary to the interpretation she urges. There, the court sets forth its understanding of "parasitical" suits:

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* Ironically, even if petitioner's strained "parasitical" suit theory were accepted, her argument to this Court would be unaided. The information upon which petitioner rests her claim was not only in the possession of the Government but was also fully summarized in the *New York Times* articles appearing long before she commenced her action. Thus, even accepting her erroneous premise, the decisions below were still correct since this suit was based entirely on publicly available information and, therefore, jurisdictionally barred.

> "It seems apparent that the purpose of Congress in enacting section 232(C) of the False Claims Act was to prevent parasitical suits where the relator attempts to base his action on non-original information already in the possession of the 'United States, or any agency, officer or employee thereof'." *Id.* at 1152.

*Accord, United States ex rel. Thompson* v. *Hays, supra; United States ex rel. Vance* v. *Westinghouse Electric Corp., supra.*

Therefore, the standard applied by the courts below is consistent with the plain language of the statute, its legislative history and all of the decisions which have thus far construed it.

In her lengthy arguments, petitioner studiously ignores both the letter and the spirit of the False Claims Act as set forth by the District Court and the Court of Appeals in this case and by other federal courts faced with similar questions. Rather than awakening a sleeping and oblivious Government to new evidence or information concerning fraudulent claims, she is attempting to dictate to, *inter alia,* the Department of Justice, the Department of Commerce, the Securities and Exchange Commission and the Congress how and when to do their respective jobs. We submit that the courts below correctly refused to aid her in this exercise.

The False Claims Act was clearly intended to reward private citizens only for awakening the Government to frauds of which it was oblivious. It does not allow such private individuals to become public prosecutors and substitute their judgment for that of the Justice Department. As the District Court noted below (A-13):

> "The Act was designed to encourge citizens to come forward with information of which the Government might



> be ignorant. It was not designed to permit citizens to call upon the courts to supervise the manner in which the Government deals with information it already has". (citations omitted)

Obviously, Congress never intended to expose citizens to suits by anybody and everybody who disagrees with the Department of Justice. The legislative purpose was to alert the Government, not supersede it.

Moreover, it is significant to note that, as applied to the facts of this case, the decisions below are undeniably correct. The various governmental investigations, both in progress at the time petitioner filed this action and commenced thereafter, have concluded that no false claims were made on the United States and that the citizenship requirements of the Merchant Marine Act had been met. For example, after undertaking an exhaustive investigation into these matters, the United States Attorney for the Southern District of New York, who coordinated the Justice Department's investigation, reported to the General Counsel of the Maritime Administration that:

> ". . . we have concluded that the facts of which we are aware do not justify the initiation of criminal or civil proceedings for violation of the citizenship requirements or the False Claims Act." *

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* This excerpt from the U.S. Attorney's report appears in a Commerce Department Release dated January 19, 1977 wherein Secretary of Commerce Elliot Richardson announced that, with his full knowledge and approval, the Maritime Administration had made a final commitment to provide Title XI guarantees with respect to the so-called Cherokee I through Cherokee V applications of which petitioner complains herein. In announcing those commitments, the Secretary stated that:

> "These loan guarantees are being extended after a thorough analysis by the Maritime Administration of the economic

(footnote continued on following page)

Similarly, the General Accounting Office concluded, after conducting an investigation requested by Congressman Jack Brooks, Chairman of the House Committee on Government Operations, in a report to Congressman Brooks dated May 16, 1977, that

> "the legal requirements for Title XI financing for the eight vessels appear to have been met."

Thus, not only did the Government have in its possession the information upon which petitioner's claim is based, but it acted upon it and concluded, after thorough investigation, that the allegations therein lacked any merit whatsoever.

## CONCLUSION

Petitioner has burdened this Court with an overly long brief which fails to counter the simple conclusion reached by Judge Knapp and affirmed by the Court of Appeals—that this case is based on evidence or information which was already in the possession of the United States at the time suit was filed. Her attempt to act herein as a *qui tam* plaintiff flies directly in the face of the purpose of the False Claims Act and the jurisdictional abatement provision thereunder and merits no further indulgence by this Court.

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(footnote continued from previous page)

soundness of the overall project and of the legal qualifications of the applicant."

The Commerce Department Release was before the Court of Appeals as Annex A to the Brief of Defendants-Appellees (Respondents).



For all the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be in all respects denied.

Respectfully submitted,


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